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November 5, 1917 to February 5, 1918
BY ALPHONSO HOWE of the St. Louis Bar.

FOR THE
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BY JOHN M. CLEARY of the Kansas City Bar.

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HON. WILLIAM DEE BECKER } *Judges.*

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CASES DETERMINED.

BY THE

ST LOUIS KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1917.

(Continued from Volume 197.)

VILLAGE OF NIXA, ex rel. and to Use of CALVIN HEDGPETH, Respondent, v. J. B. McMULLIN, F. F. RICHTER, W. A. MEADOWS, B. FRANK WEST and FENTON DORAN, Appellants.

Springfield Court of Appeals, March 24, 1917.

1. **MUNICIPAL CORPORATIONS: Marshal: Action for Damages: Instructions.** In an action against a village marshal for punitive damages for confining plaintiff in an unsanitary calaboose without food, water, or fuel, instructions as to punitive damages were faulty where they failed to require that before plaintiff could recover there must be a finding that he was damaged by his treatment.
2. ———: ———: ———: ———: **Evidence.** Such instructions were also erroneous because the evidence failed to justify them.
3. ———: ———: **Care of Prisoner: Statutes.** Under R. S. 1909, secs. 9439, 9464, defining the powers and duties of a village marshal, Sec. 9492, requiring a bond to faithfully perform duties, and Sec. 9436, giving board of trustees of village power to maintain a calaboose, a marshal making a lawful arrest must use care to see that his prisoner is not oppressed or treated inhumanely, and if the calaboose is known to him to be an unfit place of confinement, his failure to use due care and accord ordinarily decent treatment will be a breach of his bond.

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4. ———: ———: **Treatment of Prisoner: Action for Damages: Evidence.** In an action against a village marshal for punitive damages for breach of duty under bond to use due care and accord ordinarily decent treatment, evidence held to sustain a judgment for defendant.

Appeal from Christian Circuit Court.—*Hon. John T. Moore, Judge.*

REVERSED.

Charles F. Boyd and G. Perd Hays. for appellants.

The court erred in admitting evidence as to the condition of the City Prison long after the discharge of the plaintiff therefrom, for it is too remote to shed any light upon the condition of the prison at the time plaintiff was in it, and could only tend to confuse the issues in the minds of the jury, to the prejudice of the defendants. *Ritter v. First National Bank*, 87 Mo. 574; *Furgurson v. Thacher*, 79 Mo. 511; *Lore v. Forge*, 19 Mo. App. 368; *Morrison v. Garrison*, 48 Mo. App. 54; *Halpin v. Manny*, 57 Mo. App. 59.

FARRINGTON, J.—Appellant McMullin as marshal of the village of Nixa arrested Calvin Hedgpeth, a man sixty-nine years of age, for being drunk and disorderly on the streets and confined him in a calaboose, a prison claimed to have been as dark and damp and dreary as the historic Tower of London and yet so diminutive in the sight of those who had sojourned there that it is contemptuously called the Two-by-Four.

Hedgpeth brought this action against McMullin and his bondsmen for \$900 actual and \$100 punitive damages, claiming, in the first count of his petition, that McMullin wrongfully and maliciously arrested him on February 23, 1916, while he was quietly walking about the streets of the village violating no law or ordinance, and wrongfully imprisoned him for a period of —days, pleading damage, and, in the second count, the same facts with the additional charge that it was the duty of the

marshal to look after the jail and give prisoners humane treatment, whereas, wholly disregarding such duties, the marshal confined plaintiff in this jail which he had allowed to become filthy and insanitary, for a period of —days, wrongfully and maliciously causing plaintiff there to remain without food or water, at a time when the weather was extremely cold, and that there was no fuel provided by the marshal and that from the exposure plaintiff became sick, etc. The evidence shows that plaintiff was arrested about five or six o'clock in the afternoon and was released the next morning between seven and eight o'clock and told to go before the mayor, and, when it was discovered he had not done so, he was again confined until later in the morning when he was taken before the mayor and paid a fine and the costs.

The jury returned a verdict for plaintiff for \$50 on the second count. They evidently believed the marshal and his numerous witnesses who testified to the fact that Hedgpeth was intoxicated and disorderly on the streets, so that the question of unlawful arrest is out of the case.

The ordinance authorizing the arrest for being on the street in the village of Nixa in a state of intoxication was introduced in evidence.

The powers and duties of a village marshal are set fourth in sections 9439 and 9464, Revised Statutes 1909.

The bond sued on was given in conformity with section 9492, Revised Statutes 1909.

Section 9436, Revised Statutes 1909, gives the board of trustees of a village power to erect and maintain a calaboose. There is no contention that the calaboose in which plaintiff was confined was not the village jail nor that the marshal did not use it as a place to confine transgressors of the ordinances. He was undoubtedly familiar with its condition.

The jury found for the plaintiff on the second count and we will turn to the instructions given on this phase of the case. They are as follows:

"2. If you find from the greater weight of the evidence that J. B. McMullin arrested Calvin Hedgpeth

and placed him in the calaboose or jail in said village and you further find that said jail or calaboose was damp and in an unsanitary condition and you further find that the weather was cold and you further find that said marshal neglected or refused to feed said prisoner and furnish wood and water to said prisoner and treat him in a humane manner, you will find the issues for the plaintiff on the second count in the petition and assess his actual damages in any sum not to exceed \$1,000."

"3. If you find plaintiff entitled to recover on either count or both in his petition you can only find not more than Nine Hundred Dollars actual damages and not more than One Hundred Dollars punitive damages on both or either counts."

"6. If you find from the evidence that the marshal treated the plaintiff humanely, furnished him with food and wood and you find that said jail or calaboose was in a reasonably fair condition, then in that case you should find the issues for the defendant on the second count in the petition."

These instructions are not only faulty in failing to require that before plaintiff can recover there must be a finding that he was damaged by reason of the treatment accorded him at the marshal's hands, but for the further reason that the evidence fails to justify the giving of them at all.

The verdict for the defendants on the first count is supported by the overwhelming weight of the evidence that plaintiff was intoxicated and violating the city ordinance and that the marshal was acting by virtue of his office in arresting and confining him until he could be brought before the village bar of justice.

The most that can be made out of the evidence is that between five and six o'clock one evening in February (the evidence failing to disclose how cold it was) the plaintiff was lawfully arrested by the marshal for being intoxicated and disorderly after having been warned by the marshal and some of plaintiff's friends that he was intoxicated and that he had better go home.

Plaintiff's testimony is very contradictory. He testified in the first place that he was kept in the calaboose as much as twenty-four hours, and immediately afterward testified—"He came the next morning and never offered me a bite to eat, no wood, no water, and hardly said a word." And it may be remarked that in both counts of his petition it was alleged that he was confined there for —days. The plaintiff also testified that he was released in the morning and was then put back in the calaboose until ten o'clock at which time he went before the magistrate. The evidence clearly shows that he pleaded guilty to violating the ordinance.

Plaintiff testified that there was no fire, no wood, no matches, an old mattress, wet quilts, nothing to eat, and cold. He admitted he took the stovepipe down and laid it by the stove for the purpose, as he says, of letting in light, and that there were two small windows in the jail. He testified that the calaboose wasn't fit for a spotted dog. The marshal testified that when he arrested him plaintiff was "slobbering and spitting like a mad dog"; that the jail was not wet; that there was a stove, wood, and a box which he told plaintiff could be used as kindling; and that he took some supper and water to plaintiff from his home after he had eaten his supper. The village blacksmith saw him going to the jail with these, and the marshal's wife testified to having fixed up the food and water. The marshal testified that the quilts were made wet by plaintiff's own excretion and plaintiff did not see fit to deny this. Defendant's evidence also shows that when plaintiff was released from the calaboose about seven or eight o'clock the next morning he went to a restaurant where he was served coffee and eggs, and plaintiff did not deny this.

We hold the law to be that a marshal who makes a lawful arrest must use care to see that his prisoner is not oppressed and that he must not be treated inhumanely, and that, if a calaboose is in such condition—known to the officer—as to be an unfit place in which to confine a man overnight without endangering his physical condition he must not put him in there; and a fail-

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ure to use such due care and accord ordinary decent treatment will be a breach of his bond to faithfully perform his duty. The arrest as shown in this case being lawful, the marshal acting by virtue of his office in detaining the plaintiff, would, if he failed to exercise ordinary care for his prisoner make him and his bondsmen clearly liable. This is undoubtedly the law in this and other states. [See, *State ex rel. Brennan v. Dierker*, 101 Mo. App. 636, 74 S. W. 153; *State ex rel. Zimmerman v. Schaper*, 152 Mo. App. 538, 134 S. W. 671; *State to use of Goodin v. McDonough*, 9 Mo. App. 63; *State of Mississippi ex rel. McLauren v. McDaniel* (Miss.), 50 L. R. A. 118; *Stephenson v. Sinclair* (Tex.), 36 S. W. 137; *Clancy v. Kenworthy* (Ia.), 35 N. W. 427; *Gerber v. Ackley* (Wis.), 19 Am. Rep. 751; 29 Cyc. 1455.]

There is no evidence in this case of inhumane treatment or oppression in confining plaintiff in the calaboose at about six o'clock in the evening and releasing him the next morning without furnishing him any food. There is a failure to show that the weather was so inclement that to keep plaintiff there overnight was an act which no ordinary prudent officer would have done. The plaintiff's case in this record is purely imaginative and is not supported by any substantial evidence. Transgressors of the law who find themselves in the custody of officers can only expect to be treated with ordinary care so that they will not be used oppressively, and must remember that village jails are not built with a view of furnishing the luxuries of life.

There was incompetent evidence admitted which it will not be necessary to discuss as the view we take of the case disposes of the whole matter.

There is no evidence on which a jury could be permitted to find that there was a breach of the bond, the judgment will therefore be reversed. *Cox, P. J.*, and *Sturgis, J.*, concur.

S. C. POPHAM, Respondent, v. W. N. SLOAN,
Appellant.

Springfield Court of Appeals, April 24, 1917.

1. **PARTNERSHIP: Receivers: Property.** A receiver will not be appointed in partnership cases, unless there is some property belonging to the firm on which the court through the receiver will lay hands.
2. ———: ———: ———: **Evidence.** Evidence in suit based on alleged partnership relation of parties *held* not to show, what is necessary for appointment of receiver, ownership by the firm of any property which a receiver could take charge of.

Appeal from the Pemiscot Circuit Court—*Hon. Sterling H. McCarty*, Judge.

REVERSED AND REMANDED (*with directions*).

J. S. Gossom and *C. G. Shepard* for appellant.

The evidence in this case clearly fails to show a co-partnership formed between plaintiff and defendant, therefore, this action cannot be maintained, even did the petition state facts sufficient to warrant the appointment of the receiver by the court. *A. Graff Distilling Co. v. Wilson*, 172 Mo. App. 612; *Miller v. Peppeling*, 185 Mo. App. 22; *Spurlock v. Wilson*, 160 Mo. App. 14; *Willoughby v. Hildreth*, 182 Mo. App. 180; *Mingus v. Bank of Ethel*, 136 Mo. App. 407. The law never presumes the existence of a co-partnership, but requires those who assert its existence, especially between themselves, to prove its existence, by the clearest and most positive evidence. *Chaplin v. Cherry*, 243 Mo. 375; *Smith v. Shotliff*, 169 Mo. App. 66; *Brown v. Houchin*, 154 Mo. App. 261. The testimony of plaintiff, Popham, that (it was

a co-partnership business), is not a statement of a fact, but a mere legal conclusion of the witness, and as such has no probative force whatever and is not to be considered as any proof of the existence of facts necessary to establish the partnership relation. *Ellis v. Brand*, 176 Mo. App. 383.

B. L. Guffy, J. E. Duncan and J. R. Brewer for respondent.

FARRINGTON, J.—This suit was instituted by respondent against appellant alleging the existence of a partnership between them and asking that a receiver be appointed to take charge of the partnership property. The court after hearing testimony on this question made the appointment. Defendant thereupon filed a motion to vacate the order appointing a receiver. This motion was taken up and evidence was heard for both sides, after which the court overruled defendant's motion to vacate. A motion for a new trial was filed and overruled and the appeal is here on that phase of the case.

Appellant contends that the refusal of the circuit court to vacate its order appointing a receiver was error.

The evidence is uncontroverted that Sloan, the defendant, had been the agent of the Trenholm-Kolp Company, a firm of commission merchants at Memphis, Tenn., for over a year and had been buying hay and other produce as such agent, receiving as compensation a commission of fifty cents per ton on hay bought for such commission concern.

It is undisputed that the plaintiff Popham came to defendant and notified him that one Greenwell, a farmer, owned several hundred tons of hay which could be purchased at \$10 per ton, and that plaintiff and defendant went to Greenwell's farm and contracted with him to buy his hay at that price, to be paid for when the hay was loaded and shipped out. It is uncontradicted that about three hundred tons of this hay was shipped to the Memphis commission concern for whom defendant was an agent, and that at the time of the commencement of this suit there were fifty tons of the hay contracted

for still in Greenwell's possession. It is also undisputed that Sloan gave his checks to Greenwell for the hay as it was shipped out, and that he would then immediately draw a draft on the Memphis concern and attach it to the bill of lading, thus drawing on the commission concern for the money actually paid by him to Greenwell.

It is testified by defendant and by a member of the commission concern that defendant telephoned the commission concern that he could buy this hay from Greenwell, and that he was instructed to go ahead and contract for the hay at \$10 per ton; and both also testified that the compensation coming to defendant from the commission concern was fifty cents per ton, no part of which had been paid when this suit was begun or in fact at the time of the trial, it being stated by them that the commission of fifty cents per ton would be paid when all the hay was shipped.

Sloan testified that he was merely the agent of the commission concern buying produce for them, and that when plaintiff came to him and informed him of the Greenwell hay he told plaintiff he would give him half of his commission, which was fifty cents per ton, and that that being agreed upon they went to Greenwell's farm and contracted to purchase the hay.

Plaintiff testified that there was a partnership formed between himself and Sloan and that they contracted this hay as a firm at \$10 per ton and that hay had advanced in price and been sold by the defendant (all except fifty tons which was then in the possession of Greenwell) and that he had not received his part of the profit alleged to have been derived from the sale of about three hundred tons. It is therefore the contention of the plaintiff that a partnership was formed between them and that the firm was entitled to all over \$10 per ton realized from the sale of the hay, and that the hay still in Greenwell's possession belongs to the firm and that it was proper for a receiver to take charge of this property for the firm.

Sloan had paid Greenwell for the fifty tons yet in his possession, but he testified and so did the member

of the commission concern that this was paid with the commission concern's money and bought for the commission concern.

It is well settled that a receiver will not be appointed in partnership cases unless there is some property belonging to the firm which the court through the receiver will lay hands upon. [Price v. Banker's Trust Co. of St. Louis (Mo.), 178 S. W. 745; State ex rel. Merriam v. Ross, 122 Mo. 435, 25 S. W. 947; Blades v. Billings Mercantile Co., 154 Mo. App. 350, 134 S. W. 579.]

The trouble with plaintiff's contention, if there is evidence showing that a partnership was formed which we do not decide, is that the evidence entirely fails to show that there is any property a receiver could take charge of for such firm. He admittedly does not know what arrangement Sloan made with the commission concern. It is shown that that concern furnished all the money that went to buy all this hay, and it is admitted that title did not pass from Greenwell until the hay was paid for; and the uncontradicted testimony of defendant and the member of the commission concern is that the fifty tons of hay which the plaintiff now asks that a receiver take charge of was paid for by the commission concern. Plaintiff admits that he never put up any money with which to purchase any of the hay from Greenwell nor does he know whether Sloan obtained the money that was paid Greenwell nor does he deny that it was the commission concern's money that was actually paid for this hay. If there was a partnership formed between plaintiff and defendant, the latter had a right as a partner to sell this hay to the commission concern for \$10 per ton and to receive as the firm's compensation fifty cents per ton.

Upon this undisputed testimony we fail to see how Sloan's partner could have a receiver appointed for the firm to take charge of the hay that had been bought and paid for by the commission concern.

If Sloan formed a partnership with plaintiff and misrepresented what the partnership should get for the hay or the manner in which it would be handled, such

misrepresentation could not give plaintiff as one of the partners a right to interfere with the property of a third party who had dealt with one of the partners in a matter within the scope of the partnership business. He might have a right to a dissolution and an accounting under such a state of facts but where there is a failure, as here, to show that there is any property of the partnership in existence that a receiver can take hold of, a receiver should not be appointed. It is admitted by defendant and the commission concern that it owes to Sloan, with whom the contract for the hay was made, fifty cents per ton commission. This, however, is not due from the commission concern until the hay is delivered according to the evidence, and it has not been paid to defendant, and there is no claim made by the defendant that Popham is not entitled to half of such commission when the same is received from the commission concern. Plaintiff testified with reference to the deal with the commission concern that what he knew about it was what Sloan had told him. He also testified: "As a general thing, I would come down with the parties, bringing the scale receipt and Mr. Sloan would give his individual check for the hay and would turn right around and write a draft, a draft with the bill of lading attached with shipper's orders and give it back to Trenholm-Kolp Company" the commission concern. Thus, the most that can be said of plaintiff's evidence is that he might have some remedy based upon a misrepresentation made by Sloan, but his evidence fails to show any ownership of the partnership in the hay in Greenwell's possession or any firm property that a receiver could take charge of.

The facts we have stated can be clearly distinguished from those of the case of *Torbert v. Jeffrey*, 161 Mo. 645, 61 S. W. 823. There it was shown that one of the partners paid for the apples with his own money which the other partner claimed was a part of his contract to do. The apples were stored and there was no claim that they had been disposed of or belonged to a third party.

We hold that the circuit court erred in refusing to vacate the order appointing a receiver and reverse the

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judgment and remand the cause with directions to enter an order sustaining defendant's motion to vacate.

Cox, P. J., and Sturgis, J., concur.

JOHN MONTGOMERY, Respondent v. DEERING
SOUTHWESTERN RAILWAY COMPANY, Ap-
pellant.

Springfield Court of Appeals, April 24, 1917.

1. **RAILROADS: Injury to Animals: Fences: Circumstantial Evidence.** Though R. S. 1909, sec. 3145, allowing double damages for injuries to animals on railway tracks, where railway company fails to maintain a lawful fence and sufficient cattle guards, is a penal statute and must be strictly construed, circumstantial evidence may be sufficient to sustain a judgment for plaintiff.
2. ———: ———: ———: **Sufficiency of Evidence.** Circumstantial evidence, showing defective condition of railway fence, that plaintiff's cow was seen on the railway right of way, and the next morning was found injured with marks of having been violently struck, coupled with the facts that cow's tracks, evidences of collision with an animal, and hair and hide corresponding with that of plaintiff's cow were found, *held* sufficient to warrant recovery under Sec. 3145, R. S. 1909, allowing double damages where railway company fails to maintain lawful fence and sufficient cattle guards.
3. **APPEAL AND ERROR: Harmless Error: Instructions.** In the absence of evidence that plaintiff's cow, struck by a railway train, crossed over a cattle guard, the evidence showing that she reached the track by going through railway company's defective fence, instructions, not submitting question as to defects in cattle guard, were harmless.
4. **RAILROADS: Injury to Animal by Train: Damages: Instructions: Immediately.** In instructions to assess as damages the difference between the reasonable market value of said cow "immediately before" being injured on railway track and "the reasonable market value of said cow after" the injury, the word "immediately" was used to fix the condition prior to the injury.
5. **APPEAL AND ERROR: Harmless Error: Evidence: Conclusion of Witness.** Having described actual condition of railway fence in action for injury to cow struck by a train, witness' conclusion that fence was bad, was harmless.

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6. ———: ———: ———. Where witness, in answer to question, stated that he had heard of no cow being struck by a train in the community other than plaintiff's cow, admission of such evidence was harmless, although the evidence was hearsay.

Appeal from Pemiscot Circuit Court.—*Hon. Sterling H. McCarty*, Judge.

AFFIRMED.

R. L. Ward for appellant.

And such testimony as that above set out is merely opinions and conclusions and inadmissible. *Esebank v. Cy.*, 88 Mo. 650; *Southern Iron Co. v. Smith*, 257 Mo. App. 226; *Dammann v. Cy.*, 152 Mo. 186; *Fair Grieve v. Cy.*, 29 Mo. App. 141; *Walton v. Railroad*, 40 Mo. App. 544. The case was tried on opinions and conclusions of plaintiff and his witnesses over our objections and exceptions—all of which the court promptly overruled. "An opinion by a witness with regard to matters that the jury are as competent to judge as the witness is incompetent and inadmissible." *St. Louis v. Stock Co.*, 120 Mo. 541; *Koenig v. Railroad*, 173 Mo. 698; *Hurt v. Railroad*, 94 Mo. 255; *Schrodt v. Cy.*, 109 Mo. App. 627. "Witnesses must state facts and not opinions and conclusions." *Sparr v. Willman*, 11 Mo. 230; *Wethnell v. Patterson*, 31 Mo. 458.

Sam J. Corbett and *Roy G. Garrison* for respondent.

"It is objected that the petition fails to state a cause of action in that it alleged that the hog entered on the track by reason of the failure and neglect of defendants 'to erect and maintain good and lawful fences along the sides of its said road and construct sufficient cattle-guards.' The point made against the petition is that it merely alleged the failure to erect and maintain lawful fences, which is a legal conclusion; whereas it ought to have stated in what particular the fence was unlawful. The allegation of the petition was in the usual form. There is no merit in the appeal and the judgment is

affirmed." Till v. Railroad Co., 124 Mo. App. 283; Clem v. Railroad Co., 119 Mo. App., 245, 248.

FARRINGTON, J.—This is a suit brought by respondent seeking recovery of double damages under section 3145, Revised Statutes 1909, for injury to a cow owned by him alleged to have been struck by one of defendant's trains at a place in Dunklin county where defendant was required to maintain a lawful fence and cattle-guard sufficient to prevent cattle and other animals getting on the railroad. He was given a verdict for \$35 which was doubled in the judgment, and from the judgment for \$70 this appeal is taken.

Plaintiff owned a jersey cow, referred to in the record as "a breechy old gal." A field of his farm was bordered by the defendant's railway for something like a half a mile. The evidence is convincing that a fence which was maintained by the railroad company separating its right of way from plaintiff's field was not a lawful fence but on the other hand was in a bad state of repair—torn down in several places, at places trees had fallen across the wires, posts had fallen down, at places the wires were loose from the posts, and the fence was in such condition at many places along plaintiff's field as to permit animals to cross from the field onto the right of way and track. It is unnecessary to go into the details of the evidence as to all this as the bad condition of the fence is proven beyond controversy, and this condition prevailed at the time plaintiff's cow was hurt and had prevailed for a number of years prior thereto. A cattle-guard is maintained near one end of this field and several witnesses say that plaintiff's cow had been seen to cross over this cattle-guard "whenever she wanted to." On one afternoon in January the plaintiff's cow was seen in his field or pasture and later in the day was seen on the railroad right of way opposite this field. Nothing more appears concerning the cow's whereabouts until the next morning when she was found to be out of the field and in a public road in the direction of and near to another line of railway known as the Frisco. She bore evidence of having been in a catastrophe of some kind

as she was scratched and bruised and at several places on her body the hair and hide had been skinned off, one of these places testified to by the witnesses as being as big as a hand and one witness says as big as two hands. She was crippled and walked with a limp and could hardly get up or down. She appeared in this condition early the next morning after she was seen the afternoon before on defendant's right of way opposite plaintiff's field. On examination made by several witnesses there was found a place on defendant's right of way and track opposite plaintiff's field where an animal of some kind had been struck, knocked down and dragged along the ties and track, and there was also found hair and hide at this place, the hair corresponding in color with that of plaintiff's cow. The evidence discloses that prior to the time she was injured she was reasonably worth \$65 and that after her injury the cow was worth from \$10 to \$15. It is shown that she recovered from the injury except that she remained cripple and that one of the places where the hide had been knocked off had not entirely healed and haired over. The plaintiff kept her for some time, she in the meantime giving birth to a calf (be it said to plaintiff's credit that he did not claim there was a miscarriage!), and then plaintiff sold her for \$30.

With the evidence in this condition, appellant complains that its instruction directing a verdict for it should have been given.

Our attention is called to the fact that this is a penal statute and must be strictly construed and that to recover under the statute the evidence must show an actual striking of the animal by defendant's engine and cars (*Hires v. Railroad*, 157 Mo. App. 46, 137 S. W. 60; *Colbert v. Railway Co.*, 78 Mo. App. 176), and that there being no witness who actually saw how she got on the right of way the verdict of the jury was based upon conjecture rather than evidence. An additional fact should be stated and that is that it was shown that after the cow was seen on the right of way on the afternoon before the morning when she came up crippled one of defendant's trains had passed along the railroad.

The law does not require direct evidence of one who saw the collision, nor direct evidence as to how the animal came to be on the right of way and track. Such facts may be found from circumstances which strongly point to a collision between the animal and defendant's train and from circumstances from which it can reasonably be inferred how the animal arrived at the place where the collision occurred. The defective condition of the right of way fence, with the testimony that the cow was seen in plaintiff's field and afterwards on the same day seen on defendant's right of way opposite the field, are circumstances from which any reasonable mind can draw the conclusion that the animal went over or through the fence at some one of the places where it was down and not maintained as a lawful fence; and likewise the evidence that the cow was actually found injured with marks of having been violently struck, coupled with the evidence that on defendant's right of way and track were found cow's tracks and evidences of a collision with an animal and evidences of hair and hide that corresponded with that of plaintiff's cow, are circumstances from which the jury were justified in drawing the conclusion that it was plaintiff's cow that was struck by a train which was shown to have to run along this track after the animal was seen on the right of way. We cite the following cases where judgments were upheld on evidence of the same character as that contained in this record: *Payne v. Railroad*, 113 Mo. App. 609, 611 88 S. W. 164; *Reed v. Railway Co.*, 112 Mo. App. 575, 87 S. W. 65; *Clem v. Railroad*, 119 Mo. App. 1 c. 250, 96 S. W. 226; *Ehret v. Railway Co.*, 20 Mo. App. 251. In the case of *Hires v. Railroad*, 157 Mo. App. 46, 137 S. W. 60, where the judgment was reversed for a failure of proof, the court (1 c. 52), suggests the very things as absent in the proof in that case which are present in this. We are cited by appellant to the case of *Eggleston v. Railway Co.*, 177 Mo. App. 346, 164 S. W. 169, an examination of which shows the facts therein to be clearly distinguishable from those in our case. We therefore overrule appellant's contention that the demurrer to the evidence should have been sustained.

Appellant complains that the court committed error in giving instruction No. 1 asked by plaintiff, submitting, liability on a failure of the defendant to construct and maintain a good and sufficient cattle-guard on its railroad. While the evidence shows that this cow might have crossed over a cattle-guard constructed and maintained by the defendant and reached the place of the collision, and that she had been seen to cross this cattle-guard "whenever she wanted to," there is no evidence that she was seen doing so on this occasion, nor any evidence that she was at a place where she would likely do so, just prior to the time when her injury must have occurred. As stated before, the facts clearly lead to the inference that she left plaintiff's field and passed over defendant's badly maintained fence onto its right of way. And while the court should not have submitted the question of a defective cattle-guard to the jury, we are unable to conceive how such submission could in any way have affected the result.

Appellant contends that the measure of damages fixed in plaintiff's instruction No. 1 was improper. This portion of the instruction is as follows: ". . . you will find the issues for the plaintiff and assess his damages at such sum as you may find and believe from the evidence to have been the difference between the reasonable market value of said cow immediately before she was so maimed, wounded and injured and the reasonable market value of said cow after she was so maimed, wounded and injured, not to exceed, however, the sum of \$75." Appellant argues that this instruction reads that the value is to be fixed immediately before she was injured and *immediately after* her injury. The instruction does not read that way. The word "immediately" is used to fix the condition prior to the injury. The evidence is uncontroverted that this cow was worth from \$10 to \$15 after the injury, some of the witnesses fixing this as her value two weeks after the injury, and the evidence shows without contradiction that she was later sold for \$30. This, coupled with the undisputed testimony that she was worth \$65 before she was injured, is

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convincing that the jury took into consideration the damage resulting from the injury rather than what would have been her market value immediately after the injury which some of the witnesses testified was practically nothing. The instruction did not mislead the jury and the giving of the same should not be held reversible error.

Much stress is laid on the action of the trial court in admitting certain testimony over defendant's objections and exceptions, going to the question of the condition of the fence. A number of the witnesses on being asked its condition testified that it was in bad condition, which was objected to as being a conclusion. The record discloses, however, that immediately before or after such statements were made by the witnesses the actual condition was described by the witnesses—by telling that the wires were off, that the posts were down, and that trees had fallen across the fence. These objections are therefore technical and without merit. Having described the actual condition, a witness could in no way prejudice the jury or invade its province by describing it generally as bad.

It is also urged that the court erred in permitting one witness to swear that he had not heard of any other cow in the community being struck, the objection being that "it called for hearsay evidence." The answer of the witness that he had heard of none disposes of the objection.

There being no reversible error in the record before us the judgment is affirmed. *Cox, P. J., and Sturgis, J., concur.*

LON BURNHAM, Respondent, v. F. H. WILLIAMS
and PAUL D. QUINN, Appellants.

Springfield Court of Appeals, May 2, 1917.

1. **NEGLIGENCE: Liability.** In Missouri, where an injury is caused by negligence for which any one would be liable, the liability is

placed against the party whose negligence is found to be the proximate cause of the injury.

2. **PRINCIPAL AND AGENT: Act of Agent.** For the principal to be bound by the act of his agent, the agent must have acted either with the express or implied authority of the principal, and, if the agent was acting entirely outside of the principal's business for some purpose of his own, it is not the act of the principal, unless adopted by him.
3. **COMPROMISE AND SETTLEMENT: Agency: Binding Force on Insured.** Where an automobile owner was insured against loss arising from claims for damages on account of bodily injuries growing out of accidents occurring while his policy was in force, and he had a collision with the driver of another automobile, which was clearly caused by the latter's negligence, but nevertheless the latter threatened to sue insured, and the insurer's adjuster settled with the party at fault for \$200, the settlement, which insured had no hand in, he being forbidden by his contract to interfere with negotiations for the settlement of claims, did not bind him and estop him from asserting claim for damages to his automobile against the party at fault.
4. **MUNICIPAL CORPORATIONS: Automobile Collision: Pleading.** In an action for injuries to an automobile in collision with another car, the petition charged that while plaintiff was driving his car north along a street in the city, and when about thirty feet north of another street, defendant carelessly and negligently and without warning turned the car he was driving across the street immediately in front of plaintiff's car and collided with it, and further that defendant failed or neglected to go to the intersection of the street or any other street to turn his automobile, as required by the ordinances of the city. *Held*, that, under the rule that after verdict the petition must be construed favorably to uphold the verdict and judgment, the petition was sufficient, though the city ordinances, violation of which was pleaded, were not in evidence, since the petition contained a charge of common law negligence.
5. **APPEAL AND ERROR: Reservations of Ground of Review: Objection to Pleading.** If the petition was not sufficiently definite, appellants should have taken advantage of the defect by motion before trial.
6. **DAMAGES: Sufficiency of Evidence.** In an action for injuries to an automobile in collision with another, evidence *held* sufficient, in the absence of objection to plaintiff's testimony, and in the absence of any proof or attempted proof on defendant's part to the contrary, to sustain a verdict for \$100 for plaintiff.

Appeal from Butler Circuit Court.—*Hon. J. P. Foard*,
Judge.

AFFIRMED.

G. A. Hodgman and Leslie C. Green for appellants.

(1) The doctrine of comparative negligence does not obtain in Missouri. *Hogan v. Citizens Ry. Co.*, 150 Mo. 36; *Moore v. Lindell Ry. Co.*, 176 Mo. 528; *Keele v. Railway Co.*, 258 Mo. 62. (2) Accordingly, from one negligent act only one right of action arises based upon the negligence. *Coy v. Railroad*, 186 Mo. App. 408 (and cases there cited); *Stickford v. St. Louis*, 7 Mo. App. 217, affirmed in 75 Mo. 309; *Wheeler Svgs. Bank v. Tracey*, 141 Mo. 252; *Morgan v. Railroad*, 111 Mo. App. 721; *Seiglider v. Railroad Co.*, 38 Mo. App. 511; *Kellott v. Kirksville*, 132 Mo. App. 519; *King v. Railroad*, 50 L. R. A. 161; *Freeman on Judgements*, sec. 241, pages 422 et seq.; *Smith v. Railway Co.*, 189 S. W. 367; *Chicago Herald Co. v. Bryan*, 195 Mo. 574; *Cassidy v. Berkowitz, Louisville Ry. v. Same*, 185 S. W. 129; *Johnson v. Connecticut Co.*, 85 Conn. 438. (3) Voluntary compromise settlements are favored in law to prevent litigation and continued disputes. Releases based thereon will not lightly be set aside. There is no allegation by plaintiff that the release was given by mistake, fraud or misrepresentation. Plaintiff seeks to retain the benefits of the settlement and release so far as he is concerned, yet he attempts to reopen the original dispute against the party who has accepted from him a consideration to consider the matter closed. Plaintiff cannot repudiate the release in part; it must be all or none. "He who seeks equity must do equity." *Winters v. K. C. Cable R. Co.*, 160 Mo. 159; 34 Cyc., page 1050 et seq.; *Gibson v. West N. Y. Ry. Co. (Pa.)*, 30 Atl. 308; *Chicago, Etc., Ry. Co. v. Wilcox*, 54 C. C. A. 147.

L. M. Henson for respondent.

(1)—The burden of proving agency is on the party asserting it. *Wade v. Boone*, 184 Mo. App. 88; 31 Cyc. 1643. (2)—Declarations of the agents of the Hartford

Company as to authority from Burnham are incompetent to prove agency. The indemnity policy fixes the relations between Burnham and the company. Oil Co. v. Zinc Co., 98 Mo. App. 324 (3)—Under the entire record in this case plaintiff's right of recovery depends on questions of fact. The trial court passed on these questions, and its finding will not be disturbed by the appellate court. Slicer v. Owens, 241 Mo. 319; Paint Co. v. Ins. Co., 165 Mo. App. 30.

FARRINGTON, J.—Plaintiff recovered a judgment in the circuit court and defendants have appealed. Plaintiff filed his suit in a justice's court in Butler county basing his cause of action on an alleged negligent act of one Paul D. Quinn where a judgment in plaintiff's favor was rendered for \$56. Defendants appealed to the circuit court and on trial *de novo* plaintiff recovered the judgment of \$100 appealed from.

The charge of negligence in the petition is that while plaintiff was driving his automobile north along main street in the city of Poplar Bluff, and when about thirty feet north of Poplar street, defendant Quinn driving defendants' automobile carelessly and negligently and without warning turned the car he was driving across said Main street immediately in front of plaintiff's car and collided with plaintiff's car. Further, that Quinn failed or neglected to go to the intersection of Main street or any other street to turn said defendants' automobile as required by the ordinances of the city, and failed and neglected to give any warning that he was about to turn said automobile, but plaintiff alleges that said defendant carelessly and suddenly turned across said street immediately in front of the plaintiff and that plaintiff was unable to prevent a collision between his car and that of the defendants. The petition then sets out the damage done to plaintiff's car and asks damages in the sum of \$100.

It is claimed by respondent and admitted by appellants that no case could be found passing on the issue presented to us by appellant in this case, and the unique state of facts that we shall presently set out probab-

ly accounts for a failure of a court of record to have ever before been called upon to pass on the contention made.

Plaintiff owned an automobile which he operated himself, and was insured against damage occasioned by his machine in a policy or indemnity contract issued by the Hartford Accident & Indemnity Company. Defendants owned an automobile which was being operated by defendant Quinn on the day the collision occurred. The evidence clearly shows that plaintiff was driving his machine in a careful manner, on the right side of the street, going north on Main street, and that the defendant Quinn, whose car had been standing still on the right side of Main street, turned it immediately toward the west without giving any warning. At the time he did this plaintiff's car was so close that a collision could not have been prevented by the use of any means at plaintiff's hands. Without going into detail it is sufficient to say that the case made by plaintiff was that he was without blame or negligence, and that Quinn was negligent and that his act was the proximate cause of the accident. When the collision occurred both cars were damaged considerably, and Quinn was injured and rendered unconscious for several days.

Plaintiff immediately notified the insurance company of the accident and in due course of time its adjuster came to Poplar Bluff who talked with plaintiff concerning the accident. The evidence shows that plaintiff informed the adjuster of all the facts and circumstances and told him he was not to blame for the collision.

Quinn in the meantime was asserting a claim against plaintiff and threatening to sue him for \$5,000.

After some negotiations and talk with both parties it is admitted that the plaintiff told the adjuster for the insurance company that he was in no way liable or responsible for the damage to Quinn or his car. Nevertheless the adjuster for the insurance company made a settlement with Quinn in the terms of which the plaintiff was not consulted, by which Quinn was paid \$200

in full satisfaction of any claim he might have against Burnham growing out of the collision. A receipt or release was signed by Quinn in which it is stated that there is no admission of any liability on the part of Burnham. The release is as follows:

“For the sole consideration of the sum of two hundred and 00-100 Dollars (\$200) lawful money of the United States to me in hand paid this 14th day of June, 1916, by Lon Burnham, I Paul Quinn, being of lawful age, hereby release, acquit, and forever discharge the said Lon Burnham, heirs, executors, and administrators from any and all actions, causes of action, claims and demands accrued and to accrue on account of any and all known and unknown injury, loss and damage whatsoever sustained by me on or about the 29th day of January, 1916.

“It is expressly understood and agreed that the acceptance of the said amount of \$200 is in full accord and satisfaction of a disputed claim and that the payment of the said sum of \$200 is not an admission of liability.

“In witness whereof, I have hereunto set my hand and seal this 14th day of June, 1916.

“PAUL QUINN (Seal).”

Burnham, the plaintiff herein, never saw this release and did not know of the fact that the settlement had been made until he was told so by the insurance company's agent after the settlement with Quinn had been made.

Burnham then instituted this suit and recovered judgment as stated, and the defense set up is that Burnham is barred from suing the defendants because of the settlement by the insurance company's adjuster above referred to.

A great number of cases are cited by appellants, holding that the doctrine of comparative negligence does not obtain in Missouri, and that accordingly from one negligent act only one right of action arises based upon the negligence, and that ignorance of the law is no excuse to either party, that voluntary compromise settle-

ments are favored by the law, that even if a release is invalid it is binding upon the parties until attacked in a proper manner and set aside, and that the act of an agent is binding on the principal, and many other well known doctrines of the law which we do not deem applicable to the case in hand.

The sole question, as we view it, to be determined, so far as determining liability is concerned, is whether under the facts the insurance company was acting as an agent for the plaintiff in the capacity of settling a damage claim he might have against the defendants.

The policy undertook to indemnify the assured against loss arising from claims upon the assured for damages on account of bodily injuries growing out of accidents occurring while the policy is in force and caused by reason of the ownership, maintenance or use of his automobile within certain limits; and further to indemnify against damages on account of injury to property, except the property of the assured, caused or alleged to have been caused as the result of an accident. The insurance company contracted to investigate all accidents covered by the policy, to negotiate for the settlement of claims made on account of such accidents, and to defend suits even if groundless brought on account of such accidents, unless or until the company elect to effect settlement thereof. The company further agreed to pay all expense for investigations and negotiations and all costs and any judgment and interest thereon rendered in connection therewith. The contract provided that the assured should not voluntarily assume any liability nor interfere with any negotiations for settlement nor in any legal proceedings, but shall, when requested, aid in securing information and evidence. As we understand such a contract it is one where, being properly notified of an accident or damage covered by the policy the insurance company agrees to step into the assured's shoes so far as handling the claim or effecting settlement or defending suits is concerned, and that attitude that it requires an assured to take when a claim is made against him is rather one of an agent to the company than a principal for whom the

company is acting. Besides, the contract is to handle only such business as is brought against the assured and none of the provisions of the policy can be construed as giving the insurance company power to settle any claims which the assured may have against some third party.

It is very true that in Missouri where an injury is caused by negligence for which anyone would be liable, the liability is placed against the party whose negligence is found to be the proximate cause of the injury. Appellants contend that by the mere fact of the insurance company settling with Quinn in order to avoid a law suit would be determined whose negligence was the proximate cause of the damage—that the mere fact of settlement although the assured had no hand in it would be *res judicata* of that question, or rather would determine the liability so far as the assured is concerned. To this contention we cannot lend our assent. It is a well known principle of the law of agency that for the principal to be bound by the act of an agent the agent must have acted with either the express or implied authority of his principal, and that if the agent was acting entirely outside his principal's business and for some purpose of his own, it is not the act of the principal unless he adopts it. [2 Mechem on Agency (2 Ed.), secs. 1719, 1720.] Therefore in this case if it be conceded that the insurance company was acting as an agent for the plaintiff it only had authority to act for plaintiff in settling claims brought against him and there is no express or implied authority under its contract authorizing it to settle actions sounding in tort for which the assured claimed damages against third parties. Under the evidence the trial court was thoroughly justified in finding that Burnham was telling the insurance company that covered any liability so far as he was concerned that he had not been negligent and that Quinn's negligence was the cause of the accident, and further finding that the settlement was made by the company's adjuster to relieve the company of the possibility of paying a judgment which Quinn might secure against Burnham for which it would be liable.

Its contract provided that it would take care of claims whether meritorious or fictitious, and it claimed to have the right and exercised it of paying Quinn \$200 although the receipt or release expressly provided that the payment of the money was not an admission of liability. We therefore hold that the settlement made between Quinn and the insurance company—which under the evidence Burnham had no hand in, being in fact forbidden by his contract to interfere with negotiation for settlement of claims—cannot bind him and estop him from asserting a claim for damages to his property, where the collision, as shown by the record before us, was clearly caused by Quinn's negligent act to which the plaintiff's act in no way contributed.

It is next contended that the court erred in rendering judgment for plaintiff in any sum since the sole charge of negligence was based on the violation of city ordinances which were not in evidence. We have heretofore set forth a summary of the charge in the petition, and under the rule that after verdict it must be construed most favorably to uphold the verdict and judgment we overrule the contention. The petition, as we read it, not only contains a charge of negligent violation of city ordinances but a charge of common law negligence as well. If the petition was not sufficiently definite appellants should have taken advantage of it by motion before trial.

It is contended that the court erred in finding damages for \$100 and that the measure of plaintiff's damage, if any, was the reasonable cost of repairs plus the difference in the marked value of the automobile before the accident and after the repair, and that there was no testimony as to the reasonableness of the repair bill and no evidence as to an impaired market value. On turning to the record we find that the only evidence with reference to the extent and money value of the damage went in without objection on the part of defendants and is as follows: "My car was damaged; the bumper was broken and some of the springs and axles were knocked out of shape. I had the car repaired and the bill was \$56.60. The

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car has never been in as good shape since it was repaired. In my opinion the car was damaged altogether, including the amount of the repair, not less than \$100. The axle was not broken, but was bent up. I have driven the car a long time, both prior to and subsequent to the accident, and it does not run as well as it did before." In the absence of an objection to this testimony and in the absence of any proof or attempted proof on the part of defendants to the contrary the judgment is sufficiently sustained in this respect.

For the reasons herein appearing the judgment is affirmed. *Cox, P. J.*, and *Sturgis, J.*, concur.

ADA ROGERS, Respondent, v. C. C. YODER, Appellant.

Springfield Court of Appeals, May 21, 1917.

1. **CORPORATIONS: Liability on Subscriptions to Stock.** The basis of recovery in creditor's action to enforce stockholders' liability for unpaid balance of subscription is on the implied contract of the stockholders in a corporation to pay for their stock or the contract of subscription.
2. **JUDGMENT: Splitting Causes of Action.** Where creditor of a corporation had recovered judgment enforcing a stockholder's liability on subscription for certain stock, she was not barred, by the rule against splitting causes of action from bringing a similar action against the same stockholder on another block of stock purchased from another; each subscription contract being separate.

Appeal from Jasper Circuit Court.—*Hon. D. E. Blair*, Judge.

AFFIRMED.

R. M. Sheppard for appellant.

The plaintiff had a single cause of action against the defendant, Yoder, for unpaid stock subscription to

the Stag Mining Company. She chose to commence her action upon a part of this claim and to prosecute it to a final judgment after she had knowledge that the defendant was the owner of other stock upon which he would have been liable for unpaid stock subscription if he were liable upon his original subscription. This is what is termed in law a splitting of a cause of action. It is a well-established rule that a single cause of action or entire claim or demand cannot be split up or divided so as to be made the subject of different actions. If the cause of action be split and separate actions are brought for different parts of the demand, the pendency of the first may be pleaded in abatement of the other and a judgment upon the merits in either will be available as a bar in the other. First Corpus Juris., 1106; Lane v. Francis, 15 Mo. App. 107; Wheeler Savings Bank v. Tracey, 141 Mo. 252; State to the Use of DeHaven v. Davis, 35 Mo. 406; K. C. Hotel Co. v. Sigement, 53 Mo. 176; Birch v. Boemler, 204 Mo. 554.

Frank H. Lee and Owen & Davis for respondent.

FARRINGTON, J.—Plaintiff recovered a judgment against the defendant who appeals to this court urging but one point as a ground for reversal.

The suit grew out of a judgment recovered by the plaintiff herein against the Stag Mining Company, a corporation, and C. C. Yoder and Alexander Larkin. That judgment was reviewed in this court wherein we held that the stockholders of the corporation were liable to Ada Rogers for the payment of her judgment against the corporation. [185 Mo. App. 659, 171 S. W. 676.]

Yoder had subscribed for 1050 shares of stock in the corporation of the par value of \$10 each. Lafayette Rhodes had likewise subscribed for 1050 shares.

After plaintiff had brought her suit against Yoder to recover from him on his interest as represented by the 1050 shares for which he had subscribed, she learned that Yoder had become the owner by purchase of the 1050 shares which had originally been subscribed by Rhodes.

She went on with her first suit against Yoder, recovering judgment and getting the same satisfied, which did not yet pay her the amount of her judgment for damages against the Stag Mining Company, and she thereupon instituted this suit to recover from Yoder the amount due on the stock which he had purchased from Rhodes.

Appellant Yoder contends that plaintiff having once sued him on his subscription and recovered a judgment and received payment she could not again sue him as a stockholder of the corporation, as to permit this would be to violate the rule of law against splitting causes of action.

It is admitted that Yoder knew when he purchased the stock from Rhodes that the latter had not paid the amount he had contracted to pay by his subscription.

The basis for recovery in this character of case is on the implied contract of the stockholders in a corporation to pay for their stock; it is the contract of subscription which constitutes the foundation of an action to recover a call on stockholders to make their subscription good. [4 Thompson on Corporations (2 Ed.), secs. 3778-3779; 10 Cyc. 512; 1 Cook on Corporations (6 Ed.), sec. 71; Business Men's Ass'n. v. Williams, 137 Mo. App. 1. c. 583, 119 S. W. 439.] It is held that the obligation of each shareholder is several and each must respond to his contract of subscription to calls without reference to others. [10 Cyc. 510; 4 Thompson on Corporations (2 Ed.), sec. 39-90.] The contract, therefore, of the subscribing stockholders is a like contract but not the same contract; that is, each stockholder makes the same kind of contract, that he as an individual will pay full value for the amount of his subscription. The contracts, therefore, are separate. And this we think is the determining feature in this case and distinguishes it from the cases cited by appellant, the case of the Kansas City Hotel Co. v. Sigemont, 53 Mo. 176, being a fair example. There, several calls had been made of ten per cent. each, and the court held that after the calls were made and owing, a suit brought on all the calls constituted a single cause of action and could be

joined in a single count. In that case, however, the suit for the various calls was based on the contract made by the subscriber who was sued, while in the case at bar the contract on which the suit against Yoder was based is the contract of Rhodes made with the corporation which was assumed by Yoder in the purchase of that stock with full knowledge of the facts concerning it. The former suit of this plaintiff against Yoder was based on the contract made by Yoder with the corporation, and therefore was a separate and distinct contract recovered on than is the one which forms the basis of this action. The plaintiff in the former suit against Yoder recovered on a contract made between Yoder and the corporation, while in this case she recovered on a contract made by Rhodes with the corporation, the fruits and burdens of which fell to Yoder, the purchaser. They both, therefore, formed independent and separate causes of action which plaintiff could either join in one petition if she desired or might bring separately, as she has done. Numerous authorities uphold the proposition that transactions between parties which are separate and distinct are divisible; each demand or transaction is subject to a distinct and separate action. [Keller v. Olson, 187 Mo. App. l.c. 473, 173 S. W. 28; Union Loan, Storage & Merc. Co. v. Farbstein, 148 Mo. App. l. c. 228, 127 S. W. 656; Harvest King Distilling Co. v. American Express Co., 192 Mo. App. l. c. 111, 179 S. W. 806.]

The judgment will be affirmed. *Cox, P. J.*, and *Sturgis, J.*, concur.

J. A. FERRY, Respondent, v. W. J. SAWYER,
Appellant.

Springfield Court of Appeals, May 21, 1917.

1. **ANIMALS: Running at Large: Impounding.** An animal running at large may be impounded though it escapes through no negligence of the owner, and though he commenced pursuit therefor and continued it till the animal was taken by the impounder.

Ferry v. Sawyer.

2. **EVIDENCE: Judicial Notice: Cities.** Relative to a city being authorized to pass an impounding ordinance, the court will take judicial notice of its population under the census, that it is the county seat, and of the statutes on the subject.

Appeal from Pemiscot Circuit Court.—*Hon. Sterling H. McCarty*, Judge.

REVERSED AND REMANDED.

A. Sloan Oliver, Sam J. Corbett, Roy G. Garrison and Pierre S. Phillips for appellant.

Cities of the fourth class are given authority by statute to regulate or prohibit the running at large of stock, by ordinance, and to cause such as may be running at large to be impounded, to provide for the erection of all needful pounds, within or without the city limits, and appoint and compensate keepers thereof and establish and enforce rules governing the same. Section 9374, R. S. 1909; *Evans v. Holman*, 202 Mo. 295-296.

J. E. Duncan for respondent.

In the case of *Spitler v. Young*, 63 Mo. 45, Judge WAGONER, in speaking for the court, said: "As soon as plaintiff heard of the escape of his hogs and on the evening of the same day, he made pursuit of them, and on the next morning found them in possession of the defendant. Whilst physically they were found in the streets, or within the corporate limits, yet they were not there within the meaning and spirit as contemplated by the ordinance. It was intended to compel people to restrain their animals, but it was not designed to punish them for an unavoidable escape, where the owner used the requisite diligence to reclaim them."

FARRINGTON, J.—The escape of a Missouri mule is the basis of this new law suit. It was a black mare mule. The plaintiff, its owner, brought a suit in replevin to recover the mule which at the time the suit was insti-

tuted was in possession of the defendant. The jury returned a verdict for the plaintiff, allowing no damages for the detention, and defendant appeals.

The evidence offered by the plaintiff is that he had gone away from home leaving the mule in the barn and lot securely fastened, and that his wife was left in charge and care of the animal while he was away. Some raised a hue and cry that the mule had escaped from the lot. The wife who testified that she was left in charge of the mule, which would not constitute her an agent of the plaintiff so as to make her testimony competent (*White v. Chaney*, 20 Mo. App. 389, *Gardner v. Railway Co.*, 124 Mo. App. 461, 101 S. W. 684), stated that she started out to catch it. This scene is laid in the city of Caruthersville. The mule started down an alley near the lot from which it had escaped and plaintiff's wife in hot pursuit. She was of a mind that when it got to the street it would turn one way, but the mule was of a different mind and turned another way. At any rate, within from five to ten minutes after it had escaped from the lot it fell into the hands of the defendant who was the city impounder. All the evidence goes to show that there was no negligence on the part of the plaintiff or his wife in connection with the mule's escape and that its escape was against their will and that the wife was endeavoring as best she could to catch it and take it back to the barn. The evidence shows that the mule was chased and caught by the impounder "in old lady Knott's garden." The plaintiff's wife came up to the impounder, who had placed a rope on the mule and was standing talking in the street to a merchant, and asked the impounder for the animal. He declined to surrender his charge unless she would pay the regular impounding fee of one dollar. This she refused to do—and there is some evidence that she went home mad. Thereafter plaintiff brought this suit, it being admitted that he had not paid or tendered the regular impounding fee fixed by ordinance to the defendant.

The court instructed the jury erroneously by directing that the verdict must be for the plaintiff unless the mule escaped from plaintiff's lot without negligence or

fault on his part or on the part of some member of his family, and that the plaintiff could recover if his wife commenced pursuit for the purpose of taking up the mule and continued the pursuit up to the time the animal was taken in hand by the defendant. This is clearly not the law in this State, as held in *McVey v. Barker*, 92 Mo. App. 498, which distinguishes this character of case from that of *Spitler v. Young*, 63 Mo. 42. A recent case on this subject, adopting the view of the *McVey* case, *supra*, is that of *Evans v. Holman*, 202 Mo. 284, 100 S. W. 624.

Respondent, however, contends that defendant failed to establish that he was authorized as impounder to take up this mule because he failed to show what class the city of Caruthersville is, and that the ordinance creating an impounder and defining his duties and powers shown to have been passed by the common council of Caruthersville, and defendant's appointment and the bond he gave to the city of Caruthersville as impounder, were nullities so far as this case is concerned unless there was proof that Caruthersville is a city of such class as could pass such an ordinance and create the office of impounder.

We must take judicial notice that Caruthersville in the census of 1910 had a population of 3655 inhabitants and that it is county seat of Pemiscot county. It was, therefore, under our statutes, of which we take judicial notice, a city of either the third or fourth class; and on turning to the statutes we find that section 9229, Revised Statutes 1909, relating to cities of the third class and section 9374, Revised Statutes 1909, relating to cities of the fourth class, give the board of aldermen power to pass ordinances regulating and prohibiting animals from running at large and creating and appointing impounders, etc. It therefore becomes immaterial whether Caruthersville be a city of the fourth class or one of the third class because in either event it had power to pass the ordinances which were introduced in evidence prohibiting and restraining animals from running at large and creating the office of impounder and defining his duties.

This suit was originally brought in a justice court. No answer was filed by the defendant either in the justice court or in the circuit court when the case was appealed there. For the reason herein appearing the judgment will be reversed and the cause remanded. *Cox, P. J.*, and *Sturgis, J.*, concur.

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD.

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1917.

**WEIS & JENNETT MARBLE COMPANY, Appel-
lant, v. WILLIAM W. GARDINER, Defendant,
SIMON D. ROSSI, Respondent.**

St. Louis Court of Appeals. Opinion Filed November 6, 1917.

1. **MECHANICS LIENS: Leases: Liability: Improvements by Lessee.** A lessor, by binding his lessee to make improvements of substantial benefit upon the demised premises, thereby constitutes the lessee his agent, within the meaning of the Mechanic's Lien Law (Rev. St. 1909, sections 8212-8237) and may thereby subject his property to a lien for labor performed and materials furnished in making such improvements under a contract with the lessee, the obligation arising from contract and not from the relation of landlord and tenant.
2. ———: **Statutes: Construction.** The Mechanic's Lien Law is highly remedial, and should be liberally construed in favor of the lien.
3. ———: **Leases: Liability: Improvements by Lessee.** Under a lease which provided that all alterations in the way of marble paneling and decorating should be made by the lessee, and that all altera-

Weis & Jennett Marble Co. v. Gardiner.

tions, additions and improvements should become the property of the lessor, the premises leased were subject to a mechanics' lien for materials and labor furnished to the lessee in making the specified improvements.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. Kent K. Koerner*, Judge.

REVERSED AND REMANDED (*with directions*.)

Earl M. Pirkey for appellant.

(1) A party who furnishes work and materials for altering, repairing or improving a building under contract with a party holding a leasehold or licensed interest in the property is entitled to a lien on the materials furnished and on the building and on the leasehold or licensed interest. Section 8216, R. S. as amended by the Session Acts of 1911, page 312. (2) Where a lease binds the lessee to make improvements and provides that the improvements shall revert to the owner, this constitutes the lessee the agent of the owner to subject the building to a lien within the meaning of the mechanic's lien law. *Dougherty-Moss Lumber Co. v. Churchill*, 114 Mo. App. 578; *Ward v. Nolde*, 259 Mo. 285. (3) The mechanic's lien law should be liberally construed in favor of the lien. *Crane Co. v. Epworth Hotel, Construction & Realty Co. et al.*, 121 Mo. App. 225. (4) The right to go on or over land is considered by the Missouri law to be a licensed interest. *Hurt v. Adams*, 86 Mo. App. 79, paragraph 2.

Geo. W. Lubke and *Geo. W. Lubke, Jr.*, for respondent.

(1) The lease not conveying any interest in the lots on which the building in question is situated is therefore clearly a lease of two apartments in the building, the rest of which may be held separately by other tenants and the defendant *Rossi*, and therefore furnishes no basis for a mechanic's lien. The precise question was decided by this court in *Seidel v. Bloeser*, 77 Mo. App. 172. (a) In *Oliver v. Dickison*, 100 Mass.

114, it is said that any right-of-way or other easement necessary to the enjoyment of premises granted will pass as appurtenant thereto, although there is no express mention of easement, privilege or appurtenant. This is a well-established rule applicable to all grants of real estate (2 Wash. on Real Property, 667; 3 Kent's Com. [6 Ed.], 421; U. S. v. Appleton, 1 Summers, 492; Streets v. Seldens, Lessee, 2 Wall. 177; Witte v. Quinn, 38 Mo. App. 691). (2) As against the owner of the fee upon which the building is located, there cannot be a mechanic's lien against part of the building. This was decided by this court in the case of Seidel v. Bloeser, 77 Mo. App. 172, in which this court followed the case of Wright v. Cowie, 5th Washington 341. Orear v. Dierkes Lumber Company, 189 Mo. App. 729, 731. (3) The foundation of the right to a mechanic's lien against real estate and improvements thereon is a contract made with the owner of the same or some authority from the owner to the person contracting for the improvement of the real estate permitting him to do so. R. S. 1909, section 8212; Dierks & Sons Lumber Company v. Morris, 170 Mo. App. 212, 222; Ford v. Dixon, 171 Mo. App. 275.

BECKER, J.—This is a suit to enforce a mechanic's lien originating in the justice of the peace court in the city of St. Louis. From a judgment for plaintiff an appeal was taken to the circuit court by Simon D. Rossi, the owner of the property, one of the defendants, the other defendant, William W. Gardiner, lessee, did not appeal. The case was twice tried in the same division of the circuit court, but by different judges, each time without the intervention of a jury. On the first trial of the case *de novo* in the circuit court, judgment was rendered for the defendant. Later the trial judge set this judgment aside and granted a new trial. On the retrial a judgment was rendered in favor of Rossi, the only defendant who had appealed. In due course plaintiff brought this appeal.

The facts in the case are undisputed. In 1912 Simon D. Rossi, defendant below, respondent here,

was the owner of an office building located at the northeast corner of Kingshighway and Delmar Boulevards in the city of St. Louis, Missouri, five stories in height. The first floor of the building was subdivided into stores, and the rooms of the four floors above, each floor containing twenty-eight rooms, were rented to various tenants for offices. In the early part of the year 1912 defendant Rossi, the owner of the building, entered into a contract of lease with defendant Dr. William W. Gardiner, which lease was for a period of two years, and provided that Gardiner should occupy rooms 217 and 218 as offices for the practice of dentistry. Under the terms of the lease Gardiner was entitled to janitor and elevator service. The lease also provided as follows:

"Lessor agrees to place partitions and make such alterations as are indicated upon a plan prepared by the architect and signed by both parties and to include a tile floor in the two smaller rooms, and subdivide room 217."

"*The lessee agrees to make all other alterations in the way of marble panneling and decorating (italics ours) and to furnish complete room 218 as a waiting room to be used, if necessary, by future tenants who may lease rooms adjoining on the west and north upon terms agreeable to both parties.*"

"The lessee shall quit and surrender the premises at the end of the term in as good condition as the reasonable use thereof will permit, and shall not make any alterations, additions or improvements in the premises, without written consent of the lessor, *and all alterations, additions or improvements which may be made by either of the parties hereby upon the premises shall be the property of the lessor and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease.*" (Italics ours.)

While Gardiner was in possession of the rooms numbered 217 and 218 under his lease, he made an oral contract with the plaintiff to do the marble work, panneling, decorating and altering of room 217. This work amounted to \$110.25. No part thereof was ever

paid. Plaintiff duly served notice on the defendant Rossi, the owner of the building, then a lien was filed, and notice of suit given. Thereafter in due course suit was brought against said Gardiner and Rossi and a lien asked on the materials furnished and on the building and lots on which it is situated and on the lease and licensed interest of defendant Gardiner therein.

The principle is laid down that a lessor by binding his lessee to make improvements of substantial benefit upon the demised premises, thereby constitutes the lessee his agent within the meaning of the Mechanic's Lien Law and may thereby subject his property to a lien for labor performed and materials furnished in making such improvements under a contract with the lessee. [Ward v. Nolde, 259 Mo. 285, 168 S. W. 596; Carey Co. v. Kellerman Const. Co., 185 Mo. App. 346, 170 S. W. 449; Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W. 405; Curtin-Clark Hdw. Co. v. Churchill, 126 Mo. App. 28, 104 S. W. 476; McGuinn v. Federated Mines & Milling Co., 160 Mo. App. 28, 141 S. W. 467.] That obligation does not spring from the mere relation of landlord and tenant but from a contract expressed or implied between the lessor and lessee. [Carey Co. v. Kellerman Const. Co., supra.] where the lessor does no more than consent that the lessee may make improvements or alterations in the premises for the lessee's own benefit and at the lessee's cost, and where no obligation is imposed upon the lessee to make the improvements, the lessor cannot be said to have contracted for them and his estate will not be held subject to liens for the material and labor which entered into the improvements.

The Mechanic's Lien Law is highly remedial and should be liberally construed in favor of the lien. "The appellate courts of this State have always given a liberal construction to the Mechanic's Lien Law, and have administered its remedial provisions upon principles of equity. . . ." [Crane Co. v. Epworth Hotel Const. & Real Estate Co., 121 Mo. App. 225, 98 S. W. 795, and cases therein cited.]

In the instant case the covenants in the lease must be looked to as an evidence of the intention of the lessor and lessee from which, together with all other facts in the case, we can determine whether or not an agency is established within the meaning of the Mechanic's Lien Statutes.

In view of the cases cited above under the covenants in the lease requiring the lessee to make, "all other alterations in the way of marble panneling and decorating and to furnish complete room 218, as a waiting room to be used by future tenants who may lease rooms adjoining on the west and north upon terms agreeable to both parties," and that, "all alterations, additions or improvements which may be made by either of the parties hereby upon the premises shall be the property of the lessor and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease," and the facts disclosed in the record in this case, we are of the opinion that the lessee, Gardiner, was constituted the agent of the lessor, respondent herein, within the meaning of the Mechanic's Lien Law. While it has been argued that the placing of wainscoting in the room in question did not in point of fact add anything to the value of the real estate of the owner, it must be remembered that the value of the real estate consists not only in the price that may be obtained for it on the market, but also that the rental value and also the adaptability to the use for which the owner might desire to put the rooms in question must be considered. [Curtin-Clark Hdw. Co. v. Churchill, *supra*, 1. c. 469.] We hold that the putting of marble wainscoting in one of the rooms under the circumstances and conditions in the instant case was an improvement of such nature as to fall within that class of cases where the improvement is to be held of substantial benefit to the estate of the lessor.

Learned counsel for appellant and respondent have most elaborately briefed and argued the question as to whether or not the instant case comes within the purview of the new section 8216 Session Acts of 1911, page 312. In view of what we have stated above the appellant

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is entitled to his lien under section 8212, Revised Statutes of Missouri, 1909, and it is therefore not necessary for us to pass upon the question as to whether section 8216, Session Acts of 1911, is applicable to the case at bar. We will construe that statute when a case requiring its interpretation shall be properly before us. The judgment is reversed and the cause remanded with directions to the circuit court to enter judgment for plaintiff in conformity with the views herein expressed. *Reynolds, P. J., and Allen, J., concur.*

FERGUSON-McKINNEY DRY GOODS COMPANY,
Respondent and Plaintiff in Error, v. **GEORGE O.**
BEUCKMAN, Appellant and Defendant in Error.

St. Louis Court of Appeals. Argued and Submitted October 5, 1917.
Opinion Filed November 6, 1917.

1. **COMPOSITIONS WITH CREDITORS: Secret Preferences: Validity.** A creditor fraudulently securing a secret preference over other creditors cannot recover on a note representing such preference after receiving payment under a composition agreement.
2. **———: Bankruptcy: Promise after Discharge: Consideration: Moral Obligation.** A debtor who has gone into a composition with his creditors, or who has been discharged in bankruptcy, if he afterwards voluntarily promises his debtor to pay the unpaid part of the original debt, contracts a moral obligation which is a good and sufficient consideration to pay such debt.
3. **———: Secret Preference: Validity.** A debtor's note given after a composition settlement as a substitute for a previous note representing a secret preference is void.
4. **———: ———: Estoppel.** A creditor who induced other creditors to accept a composition settlement without signing it cannot claim that such settlement was void for lack of signatures in his suit to recover on a note representing a secret preference given him by the debtor.
5. **———: Validity.** The failure of certain creditors who accepted composition payments to sign the composition agreement does not render such agreement void, but only voidable.

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6. ———: **Secret Preference: Recovery.** A debtor paying money to a bank for distribution among his creditors under a composition agreement cannot recover back an alleged preferential payment to a creditor, since he lost all interest in the property beyond a right to have the bank account for its proper distribution.
7. **PAYMENT: Voluntary Payment: Recovery.** Evidence examined regarding payment of an additional sum by a debtor to a creditor after having paid the amount specified in a composition agreement, and *held* to establish that the second payment was voluntary.
8. ———: ———: ———. A debtor cannot recover back a voluntary payment to a preferred creditor made subsequent to a composition agreement and payment thereunder.

Appeal from the Circuit Court of the City of St. Louis.
 —Hon. Kent C. Koerner, Judge.

AFFIRMED.

Stern & Haberman, H. A. and Harry S. Gleick, for plaintiff in error and respondent.

(1) Part A. The burden of proof is the duty resting upon the party who asserts the affirmative of an issue to prove the same by a preponderance of the evidence. *Ranney v. Lewis*, 182 Mo. App. 58, 64, 167 S. W. 601; *Glover v. Henderson*, 120 Mo. 367, 381, 35 S. W. 175, 41 Am. St. Rep. 695; *Bathe v. Insurance Co.*, 152 Mo. App. 87, 94, 132 S. W. 743. (2) Where there is a finding of fact by the lower court sitting as a jury, and the record discloses sufficient evidence to sustain that finding, the appellate court must sustain it; and where there is no separate finding of fact, it will be presumed on appeal that the trial court reached the correct result. *Paine v. O'Donnell*, 191 Mo. App. 300, 301, 178 S. W. 873; *Gentry v. Rider Jewelry Co.*, —Mo. App. —194 S. W. 1057, 1060; *Kansas City Breweries v. Teter*, —Mo. App. —194 S. W. 732; *Stringfellow v. Roseborough Co.*, —Mo. App. —196 S. W. 1050, 1053; *Finkelburg and Williams' Missouri Appellate Practice* (2 Ed.), p. 149. Where the cause was tried by the court without the intervention of a jury, the court's findings of facts, supported by substantial evidence, are conclusive on appeal.

Barton v. Louisville & N. R. Co.,—Mo. App.—196 S. W. 379, 380; Rough v. Rough—Mo. App.—195 S. W. 501, 504. If a record is susceptible of two interpretations, that will be given it which will sustain the judgment of the inferior court. Stringfellow v. Roseborough Co.,—Mo. App.,—196 S. W. 1050, 1053; Finkelnburg and Williams' Missouri Appellate Practice (2 Ed.), p. 149. (3) Fraud will never be presumed where all the facts consist as well with honesty and fair dealing; where two views are open, one noble and the other not, courts are warranted in taking the nobler view. Kansas City v. Woerishoeffer, 249 Mo. 1, 32, 155 S. W. 779, 786; Garesche v. MacDonald, 103 Mo. 1, 158 S. W. 379; Ames v. Gilmore, 59 Mo. 537; Hardwicke v. Hamilton, 121 Mo. 465, 26 S. W. 342; Warren v. Ritchie, 128 Mo. 311, 30 S. W. 1023. (4) No property, including choses in action, belonging to a wife shall be deemed reduced to possession by the husband unless the wife's assent, in writing, shall have been given by the wife. Revised Statutes, Missouri, 1909, sec. 8309; McGuire v. Allen, 108 Mo. 403, 409, 18 S. W. 282; Hurt v. Cook, 151 Mo. 416, 427, 52 S. W. 396; Case v. Espenschied, 169 Mo. 215, 220, 69 S. W. 276. (5) A debtor who seeks to recover an alleged fraudulent payment made in accordance with a secret agreement entered into at the time of a composition must come with clean hands, and unless he can show that the payment was actually made under duress, or as the result of threats or compulsion, the doctrine "*in pari delicto*" applies. Wilson v. Ray, 10 Ad. & Ellis 82, 2 P. & D. 253; Moses v. Katzenberger, 1 Handy (Ohio) 46; Higgins v. Pitt, 4 Exch. *312. *325; Langley v. Van Allen & Co., 32 Can. Sup. Ct. 174, 182-3, *semble*; Crowder v. Allen-West Commission Co., 213 Fed. 177, 181, 129 C. C. A. 521; Smith v. Veigler, 17 N. Y. S. 338, 340; Solinger v. Earle, 82 N. Y. 393; Mehr v. Starr, 138 N. Y. S. 317; Crossley v. Moore, 40 N. J. Law 27, *semble*; Pollock on Contracts (8 Eng. Ed.), p. 403; Williston's Wald's Pollock on Contracts, p. 504; 12 Corpus Juris 292, sec. 94. (6) The title of a bankrupt to all of his property, including his choses in action, except that set aside as exempt, upon adjudication be-

comes divested by operation of law and thenceforth is "*in custodia legis*;" and when no trustee is appointed because the bankrupt has scheduled no assets, the bankrupt cannot after his discharge claim title to assets which he has concealed. *Lazarus v. Musica*, 234 U. S. 263, 266, 34 Sup. Ct. 851, 58 L. Ed. 1305, 32 Am. B. R. 559; *First Nat. Bank v. Lasater*, 196 U. S. 115, 25 Sup. Ct. 206, 49 L. Ed. 408; *Rand v. Sage*, 94 Minn. 344, 102 N. W. 864; *Scrubby v. Norman*, 91 Mo. App. 517, *semble*; *Fowler v. Jenks*, 90 Minn. 74, 11 Am. B. R. 255; *Laing v. Fish*, 119 Ill. App. 645, *semble*; *Patterson v. Boyd*, 150 S. W. (Tenn.) 424; *In re Abrahamson*, 1 Am. B. R. 44. The decisions of the United States Supreme Court in construing the Bankruptcy Act are controlling upon the State Court. *Rosenfeld v. Siefried*, 91 Mo. App. 169; *Wise Coal Co. v. Columbia Co.*, 123 Mo. App. 249, 264. (7) When a proposed agreement to compound a debt contains a provision that the agreement is not to be binding unless all creditors agree to accept, this provision is a condition which must be complied with; if it is not then there can be no composition. 12 *Corpus Juris*, 262, sec. 23; *Falconbury v. Kendall*, 76 Ind. 260; *Artman v. Truby*, 130 Pa. St. 619; 18 *Atl.* 1065; *Laird v. Campbell*, 100 Pa. St. 159, 164; *Greer v. Schriver*, 53 Pa. St. 259; *Lower & Barron v. Clement*, 25 Pa. St. 63, 66-67; *Acker v. Phoenix*, 4 *Paige* (N. Y.) 305; *Cutter & Co. v. Reynolds*, 47 Ky. (8 B. Mon.) 596; *Seed Dry-Plate Co. v. Wunderlich*, 69 Minn. 288, 290-1, 72 N. W. 122; *Paulin v. Kaign*, 27 N. J. Law 503, 512; *Chase v. Bailey & Co.*, 49 Vt. 71, 74; *Davis v. Doerr*, 14 N. Y. 322, 325; *Day v. Jones*, 150 Mass. 231, 22 N. E. 898; *Abel v. Allemania Bank*, 79 Minn. 419, 422, 82 N. W. 680. The existence of a written contract cannot be proved by parol evidence of payments purported to have been made under it. *Lionberger v. Pohlman*, 13 Mo. App. 123; *Blondeau v. Sheridan*, 81 Mo. 545. The acceptance of payment under the composition is not a waiver of the provision that all must accept. 12 *Corpus Juris*, 263, sec. 25; *Greer v. Shriver*, 53 Pa. 259; *Durgin v. Ireland*, 14 N. Y. 322. (1) Part B. When the execution

and delivery of a promissory note are admitted by the maker, the defense of want of consideration is affirmative, and the burden of proof is upon the defendant. Revised Statutes of Missouri, 1909, sec. 2774; Home Building & Loan Ass'n v. Barret, 160 Mo. App. 164, 177, 141 S. W. 726. (2) When a proposed agreement to compound a debt contains a provision that the agreement is not to be binding unless all creditors agree to accept, this provision is a condition which must be complied with; if it is not, then there can be no composition. 12 Corpus Juris, 262, sec. 23; Falconbury v. Kendall, 76 Ind. 260; Artman v. Truby, 130 Pa. St. 619, 18 Atl. 1065; Laird v. Campbell, 100 Pa. St. 159, 164; Greer v. Shriver, 53 Pa. St. 259; Lower & Barron v. Clement, 25 Pa. St. 63, 66-67; Acker v. Phoenix, 4 Paige (N. Y.) 305; Cutter & Co. v. Reynolds, 47 Ky. (8 B. Mon.) 596; Seed Dry-Plate Co. v. Wunderlich, 69 Minn. 288, 290-1; 72, N. W. 122; Paulin v. Kaighn, 27 N. J. Law, 503, 512; Chase v. Bailey & Co., 49 Vt. 71, 74; Day v. Jones, 150 Mass. 231, 22 N. E. 898; Abel v. Allemania Bank, 79 Minn. 419, 422; 82 N. W. 680. The existence of a written contract cannot be proved by parol evidence of payments purported to have been made under it. Lionberger v. Pohlman, 13 Mo. 123; Blondeau v. Sheridan, 81 Mo. 545. The acceptance of payment under the composition is not a waiver of the provision that all must accept. 12 Corpus Juris, 263, sec. 25; Greer v. Shriver, 53 Pa. 259; Durgin v. Ireland, 14 N. Y. 322. (3) A subsequent voluntary promise to pay a debt discharged by a composition agreement is based upon a sound moral consideration and may be enforced, according to the better view. Trumbull v. Tilton, 21 N. H. 129; Willing v. Peters, 12 Sergeant & Rawle (Pa.) 117.

John A. Blevins and John E. Murphy for appellant and defendant in error.

(1) It is a well established rule that a promissory note or other security given by a debtor to a creditor

as a secret preference in order to induce the latter to join in a composition agreement with other creditors of the debtor, is fraudulent and void in the hands of the payee and the debtor may himself set up the invalidity as a defense in an action wherein it is sought to be enforced. *Brown v. Everett*, 111 Ga. 404; *In re Chaplin*, 115 Fed. R. 163; *Crossley v. Moore*, 40 N. J. L. 27; *Bean v. Brookmire*, 2 Fed. Cases, p. 1134 (Mo. Case); *Bullene v. Blain*, 4 Fed. Cases, 646; *Atkinson v. Denby*, 7 H. & N. 933; *Smith v. Brompley*, 2 Doug. 696 (Note); *Clements Appeal*, 49 Conn. 519; *Willis v. Morris*, 63 Texas 458; *Glenn Falls Natl. Bk. v. Van Rostrand*, 85 N. Y. S. 50; *Breck v. Cole*, 4 Sandf. (N. Y.) 79; *Woodman v. Stow*, 11 Ill. App. 613; *Hardie v. Scheen*, 110 La. 612; *Howe v. Litchfield*, 3 Allen (Mass.) 443; *Story on Equity Jurisprudence*, p. 385, par. 379; *O'Shea v. Collier White Lead Wks.*, 42 Mo. 391; *Cockshott v. Bennett*, 2 T. R. 763; *Moore v. Sanford*, 1 Griff. 288; *Gilmour v. Thompson*, 49 Howard (N. Y.) 198; *In re Lenzberg's Policy*, L. R. 7 Ch. Div 650; *Turner v. Hoole*, 16 English C. L. Reports, 419; *Mare v. Warner*, 3 Griff. 100; 16 Am. & Eng. Anno. Cases, 1072. (2) The debtor may, in defense to an action upon a note so given, not only set up that it is void, and defeat a recovery thereon, but may, by way of cross-action or counter-claim, claim and obtain a judgment against the plaintiff for the money paid in pursuance of the illegal supplemental agreement. *In re Chaplin*, 115 Fed. Rep. 163; *Breck v. Cole*, 4 Sandf. (N. Y.) 79-83; *Cockshott v. Bennett*, 2 Term. R. 763; *Story on Eq. Jurisprudence*, page 385, par. 379; *Bean v. Brookmire*, 2 Fed. Cases 1134; *Crossly v. Moore*, 40 N. J. L. 27; *Brown v. Everett*, 111 Ga. 494. (3) Money paid under a secret agreement as an inducement to the creditor to sign or in excess of his claim under the composition, may be recovered back by the debtor, as the law regards the payment as having been made under duress, and recovery is allowed on the ground of public policy. 6 American & English Enc. of Law, page 396; *Brown v. Everett*,

Ridley Ragen Co., 111 Ga. 404; Bean v. Brookmire, 2 Federal Cases 1134 (Mo.); Crossley v. Moore, 40 N. J. L. 27; Smith v. Cuff, 6 M. & S. 160; Willis v. Morris, 63 Texas 458; Atkinson v. Denby, 7 H. & N. 943; Story on Equity Jurisprudence, page 385, paragraph 379. (4) It is immaterial whether the security is given before or after the payee has given his assent to the composition agreement, if when such assent is given there is an understanding, tacit or express, that the debtor shall give the payee a preference, and the security is given in pursuance of such understanding. Clements Appeal, 52 Conn. 464; Woodman v. Stow, 11 Ill. App. 613; Hardie v. Scheen, 110 La. 612; Howe v. Litchfield, 3 Allen (Mass.) 443; Willis v. Morris, 63 Texas, 458. (5) A valid and binding composition is not essential to render invalid a security given as a preference; the invalidity of the secret preference springs from the character of the transaction in violation of commercial integrity and ordinary business morality. Glen Falls Nat. Bank v. Van Rostrand, 85 N. Y. S. 50, affirmed in 103 App. Div. 598. (6) To pay one creditor or his agent a larger sum than was paid others, as a condition of accepting the compromise, is void, and if the creditor's agent was specially retained by the debtor to urge the compromise, any promise to pay the agent for such service is void. Bullene v. Blain, 4 Fed. Cases 646; Friedberg v. Tresitschke, 36 Nebr. 881. (7) A composition performed operates as such an absolute discharge of the debts included in its scope that a subsequent promise to pay those debts cannot be enforced, being entirely without consideration; the moral as well as the legal obligations of payment is considered to be discharged. Bates v. Rosenberg, 121 N. Y. S. 335; Brown v. Everett, 111 Ga. 404; Warren v. Whitney, 24 Maine 561; 6 Amer. & Eng. Enc. of Law, page 390. (8) As to whether a creditor who has made a secret fraudulent contract more beneficial to himself than the other creditors in signing a composition may thereafter claim that the composition is void on account of fraudulent preferences to

other creditors, and demand payment of his whole claim, the weight of authority is against the right of such creditor to ignore such composition. *Baldwin v. Roseman*, 49 Conn. 105; *O'Brien v. Greenbaum*, 92 Calif. 104; *Mallalien v. Hodgon*, 16 Q. B. 689, 23 L. R. A. (Old Series) page 36. (9) In order to entitle a creditor from whom preferences of other creditors have been concealed to relief from such a fraud by avoiding the composition agreement, he must come into court with clean hands; and when it appears that the plaintiff himself, as a consideration for his assent to the agreement, bargained for and obtained a secret preference over other creditors who signed the agreement, and which was fraudulent as to them, he is not entitled to any relief because other creditors obtained advantages similar to his own. *O'Brien v. Greenbaum*, 92 Calif. 104; *White v. Kuntz*, 107 N. Y. 518; *Mallalien v. Hodgon*, 16 Q. B. 689, 16 Ad. & E. (N. S.) 690; *Child v. Danbridge*, 2 Vern. 71; 6 American & Eng. Enc. of Law, page 398. (10) It is no defense to an action of this kind that the composition deed was invalid because not signed by all the creditors, pursuant to its terms, it appearing that the greater part of the creditors believed that the composition had been signed by all creditors in good faith. *Bean v. Brookmire*, 2 Fed. Cases 1132; *Willis v. Morris*, 63 Texas 458; *Hardie v. Scheen*, 110 La. 612; *Woodman v. Stow*, 11 Ill. App. 613. (11) Under the National Bankruptcy Act of 1898 (section 70), the appointment of a trustee is essential to divest the bankrupt of the title to his property, and therefore an adjudication in bankruptcy does not divest the bankrupt of the title to a chose in action, where the adjudication is had without the appointment of a trustee. *Rand v. Iowa Central Ry. Co.*, 186 N. Y. 58, reversing same case in 96 N. Y. App. Div. 413 (1906); *Johnson v. Collier*, 222 United States 538 (1911); *Fuller v. Jameson*, 184 N. Y. 605; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12; *Gordon v. Mechanics & Traders Ins. Co.*, 120 La. 441; *Remington on Bankruptcy Supplement*, sec. 1120, page 278; *Black on Bankruptcy*, 1914

Edition, sec. 197, page 490; 1 Loveland on Bankruptcy, pages 757-758; Collier on Bankruptcy (11 Ed.), page 220. (12) If a bankrupt owns a chose in action, the existence of which chose is not disclosed by him in bankruptcy proceedings, and they are therefore terminated without the appointment of any trustee, the bankrupt's title to such chose in action does not pass out of him, and he may subsequently maintain an action thereon. *Rand v. Iowa Central Ry. Co.*, 186 N. Y. 58, (1906); *Johnson v. Collier*, 222 United States 538 (1911); *Fuller v. Jameson*, 184 N. Y. 605; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12; *Perry v. Carnes*, 86 Mo. 652; *Shipman v. Daubert*, 7 Mo. App. 576; *Wilsey v. Jewett Bros. Co.*, 122 Iowa, 318; *Griffin v. Mutual Life Ins. Co.*, 119 Ga. 664; *Gordon v. Mechanics & Traders Ins. Co.*, 120 La. 441; *Remington on Bankruptcy Supplement*, sec. 1120, page 278; *Black on Bankruptcy* (1914 Ed.), sec. 197, page 490; 1 Loveland on Bankruptcy, pages 757-758; *Collier on Bankruptcy* (11 Ed.), page 220; 7 *Corpus Juris*, page 108; *Miller v. Barto*, 247 Ill. 104.

REYNOLDS, P. J.—This action, commenced by plaintiff below, now respondent as well as plaintiff in error, counts on a promissory note dated at St. Louis, February 1, 1910, for \$2991.18, the note signed by appellant and defendant in error, the amount payable after date on demand with interest to be compounded annually. Judgment is asked for the amount of the note and interest.

The answer, admitting the execution and delivery of the note, after denying any indebtedness thereon, by way of defense states that in the years 1907 and 1908 and prior thereto, defendant was engaged in the mercantile business as a retail dealer in general merchandise in Ozark, Arkansas; that in those years he became heavily involved financially and failed in business, and was indebted to many different creditors in various amounts aggregating in all several thousand dollars; that plaintiff was one of these creditors and that defendant at that time owed plaintiff \$7623.34;

that when defendant became so involved financially, at the suggestion of plaintiff, a compromise or composition was entered into by defendant with his creditors, whereby the latter agreed to accept in settlement and payment of their respective claims the sum of fifty cents on the dollar thereon; that plaintiff urged the execution of this compromise agreement upon, and caused it to be presented to defendant's creditors for their approval and execution, and that it was signed and executed by plaintiff and the defendant's creditors upon the request of plaintiff, and the compromise or composition carried out and the sum of fifty cents on the dollar of the respective claims paid by defendant to his creditors under this agreement; that at the time of the execution of the composition agreement by the defendant's creditors and at the time it was carried out and fifty cents on the dollar paid to the creditors, plaintiff urged and insisted secretly that defendant pay plaintiff the full amount of its claim but concealed such demand from the other creditors of defendant and pretended to the other creditors that it was to receive payment of its claim at the rate of fifty cents on the dollar, the same as was to be received by defendant's other creditors; that by reason of and in pursuance of these demands of plaintiff that defendant pay it the full amount of its claim, defendant did pay to plaintiff on its claim fifty cents on the dollar as provided by the composition agreement, and in addition thereto the sum of \$1181.16 and executed the note herein sued upon for the amount of \$2991.18 for the balance of plaintiff's claim, with interest thereon, and delivered it to plaintiff; that this note now sued upon was given to plaintiff by reason of these secret and fraudulent demands made by plaintiff and in fraud of the other creditors and of defendant and is null and void. Wherefore defendant demands that he be dismissed with his costs.

By way of a counterclaim, defendant, repeating the averments in his answer, alleges that by reason of plaintiff's secret and fraudulent demands that he do so, he had paid plaintiff the sum of \$1181.16 in

cash over and above the fifty cents on the dollar, as provided by the composition agreement, and had executed the note in suit for the balance of plaintiff's claim by reason of plaintiff's secret, unreasonable and fraudulent demand, as before set out, and he avers that by reason of the premises he (defendant) is entitled to judgment against plaintiff for the sum of \$1181.16, so paid to plaintiff, for which, with costs, he prays judgment.

The plaintiff replied to the answer by a general denial and after a general denial of the averments of the counterclaim it is set up that on September 21, 1909, defendant filed a petition in bankruptcy and received his discharge in bankruptcy on January 18, 1910, after the alleged transactions in the defendant's counterclaim; that the amount alleged in defendant's counterclaim to have been paid by him to plaintiff was not scheduled among his assets or filed by the defendant in the bankruptcy proceedings, and that any right, title or interest that defendant may have had in and to the amount alleged in the counterclaim has been divested by the bankruptcy proceedings, and that defendant is thereby estopped to set up any claim thereto.

What is called a replication was filed to this answer to the counterclaim, denying the averments of it.

The cause was submitted to the court, a jury being waived, and after being taken under advisement the court found for defendant on plaintiff's cause of action and for plaintiff on defendant's counterclaim, rendering judgment accordingly. On the same day upon which the court rendered its finding and judgment, the court, at the request of counsel for defendant, filed instructions or declarations of law, two of which were given and one refused. The first of those given was to the effect that if the note sued on was given under the circumstances set out in the answer, plaintiff could not recover. The one marked third asked and given was to the effect that if the court, sitting as a jury, found from the evidence that a few of the credi-

tors of the defendant did not sign the agreement referred to, to accept fifty cents on the dollar for their respective claims, yet if the court further believed from the evidence that plaintiff waived the signatures of such creditors by asking that the terms of the agreement be carried out without other signatures, plaintiff cannot now be heard to complain of the failure of such creditors to sign the contract.

We will notice the second declaration asked and which was refused when we hereafter treat of the counterclaim, as it was pertinent to that alone.

Following the decision of the court, plaintiff moved for a new trial on the finding of the court against it on its cause of action, which motion was overruled, and plaintiff, excepting, sued out its writ of error.

The defendant also filed a motion for a new trial on the finding against him on his counterclaim, which motion was overruled, defendant excepting, thereupon appealing to our court.

Counsel for the respective parties raise many points and have favored us with very elaborate arguments, these arguments accompanied by the citation of numerous authorities. In our view of the case it lies within a very narrow compass.

Considering the position of plaintiff as plaintiff in error and covering the action of the court in finding against it and for the defendant on the note sued on, we think that the action of the trial court in so finding was sustained by the facts and by authority.

In 5 Ruling Case Law, p. 874, section 7, it is stated:

"The weight of authority is clear that a creditor not guilty of fraud may recover on the original claim and ignore a general composition where another creditor has secretly obtained an undue advantage and a fraudulent preference in the composition."

We have no such situation here. After stating the rule as above, that authority proceeds:

"But a creditor guilty of a fraud on the other creditors in obtaining a secret preference cannot recover on a note or other contract for the balance of

his original claim remaining after receiving payment under the composition."

The note at page 38, 27 L. R. A. (1895), to Hanover National Bank v. Blake, 143 N. Y. 404, is cited for this, and a reference to that shows abundant authority in support of the text. To the same effect see 8 Cyc., commencing with paragraph B, page 468, as also 12 Corpus Juris, pp. 289 and 390, section 89, subdivision e.

There was ample evidence in this case warranting the trial court in arriving at its conclusion that this plaintiff had been guilty of fraud on the other creditors in exacting a note from the defendant for the balance unpaid on its claim, the plaintiff having been an active agent in procuring the signatures of other creditors to the composition and in obtaining releases at the rate of fifty cents on the dollar from a few creditors outside of those signing. In considering the matter of the counter claim, we will go into the facts somewhat more at length and refer to what we there say as to them. It is sufficient to say here that there is evidence to the effect that plaintiff executed the note for which this is a substitute as a condition of signing the so-called composition and concealed that from the other signing creditors, whose signatures it procured.

But it is said that the note sued on is not the note which was given at the time the composition agreement was entered into but was a new note given for the difference unpaid on the old account, after the composition agreement had been fully executed and after defendant had been discharged in bankruptcy, it being claimed that a moral obligation to pay the debt, although discharged from its payment, was a good and sufficient consideration. It is true that if a party who has gone into a composition with his creditors, or who has been discharged in bankruptcy, afterwards voluntarily promises his debtor to pay the unpaid part of the original debt, that the moral obligation is a good and valuable consideration for the note or for a promise to pay. Without going out-

side of our State for authorities, it is sufficient to refer to the decisions of our court in *Fleming v. Lullman*, 11 Mo. App. 104; *Reith v. Lullman*, *Ibid.* 254; *Farmers & Merchants Bank of Vandalia v. Richards*, 119 Mo. App. 18, 95 S. W. 290. The two former cases are cited in the latter, in which it is held that the discharge of a debtor in bankruptcy releases the debtor from his legal obligation to pay, but the moral obligation to pay remains and furnishes a sufficient consideration in law for a new promise to pay, and the debtor is bound by a new promise to pay, made unconditionally, without other consideration. In all those cases it appeared that the new promise had been made after the discharge in bankruptcy and without any prior or secret agreement to pay. But in the case at bar, while the note sued on purports to be a new contract, in point of fact it is but a substitute for the original note, which was given for the portion of plaintiff's claim against defendant remaining unpaid when plaintiff signed the composition agreement. That note originally given, undoubtedly, as the authorities to which we have referred above show, was void. That first note was held by plaintiff in this case until defendant instituted proceedings to have himself adjudicated a bankrupt and either at his own suggestion, or at the suggestion of plaintiff, and on this there is a difference in the testimony, that note was cancelled and destroyed. After the discharge of defendant in bankruptcy he gave this present note. The consideration for this new note could not be, was not other than for the first, and if the first was void for the reasons we have stated, so was the one now in suit. It is true that defendant, when he gave this present note was not under any coercion; in point of fact, he was not in St. Louis, where plaintiff resided and had its place of business, at the time he signed it, but was in Arkansas and in the employ of another concern. This note in suit was sent to him by mail; he retained it for about two months and then returned it to plaintiff, signed by himself.

But after all, this was a mere substitute for the first note, and left the present note dependant for any consideration whatever, morally or otherwise, upon the first note given and which had been surrendered or destroyed. Under these circumstances we conclude that the note now in suit rests on no obligation of any kind, moral or otherwise, and is not enforceable in the hands of plaintiff.

Learned counsel for plaintiff, however, claims that as many of the creditors of defendant, who were such at the time this composition was entered into, had not signed it, it was of no effect and never became of legal force, and so complain of the declaration numbered third. The answer to this is, that this plaintiff is in no position to make any such claim here. It was the procuring cause of the signatures to the proposed composition by all the creditors who signed it and who accepted fifty cents on the dollar on their claims, or who, without signing, accepted the composition; and plaintiff distinctly represented to all these that practically all the defendant's creditors, whose signatures were important, had signed or agreed to the composition. Learned counsel for plaintiff argues that other creditors who were paid not having in fact signed the composition, their acceptance of the fifty cents on the dollar on their claims, is of no effect. That may be, but that did not make it void, but voidable only, as see *Crowder v. Allen-West Commission Co.*, 129 C. C. A. Reps. 521, 1. c. 525. Undoubtedly, the learned trial judge found that it does not lie in the mouth of plaintiff to urge either of these defenses, plaintiff having been active in procuring releases from a large number of the creditors. So it is said in 12 *Corpus Juris*, p. 292, sec. 94, citing many authorities to that effect. Even conceding that a number of creditors, who were holding among them large claims, did not sign, still plaintiff held out to those signing that the composition had been perfected, and on this, induced them to enter with it and accept the fifty per cent agreed upon.

We hold that the action of the trial court, under the evidence in the case and under the law applicable

to it, was correct in holding that the plaintiff could not recover on its cause of action.

That brings us to the consideration of the claim of appellant and defendant in error to the action of the trial court in finding against him on his counter-claim.

The facts peculiarly applicable to that transaction are these:

Along in the early part of March, 1908, it appears that defendant, who was engaged in the mercantile business at Ozark, Arkansas, became embarrassed financially and that the Ferguson-McKinney Dry Goods Company, learning of that, its secretary Mr. Bogy, requested defendant to meet him at Fort Smith, Arkansas. Defendant at that time, admittedly, was indebted to plaintiff on general account for merchandise sold and delivered, in the sum of \$7623.34. Accordingly Mr. Bogy went to Fort Smith, arriving there on March 22, 1908, that being Sunday. He there met defendant, who was accompanied by a Mr. Turner, who at that time was the cashier of the Peoples Bank of Ozark, Arkansas. Apparently for the first time Mr. Bogy, representing plaintiff, was then made aware of the bank's claim, which amounted in round numbers to something over \$20,000. After some discussion between the parties, that is Turner, Beuckman and Bogy, a lawyer of Fort Smith, referred to in the testimony as Judge Reed, was called in for consultation over the situation. Whether Bogy or Beuckman or Turner called this gentleman in, does not clearly appear. At any rate, as the result of the conference between all four, it was arranged that all the effects of defendant should be sold out and the proceeds turned over to the Peoples Bank, out of which the bank was to pay such creditors as would accept the composition and retain whatever balance might remain in payment of the amount due it, as far as it would go. How much the property sold for brought is not very clear. The cashier of the bank said it brought about \$17,740.44. It appears that on September 21, 1909, Beuckman instituted proceedings in bankruptcy, which resulted in his discharge January

18, 1910. In Schedule "B," filed by Beuckman with his petition, and to which schedule he made oath on September 21, 1909, under the heading, "Property Heretofore Conveyed for Benefit of Creditors," it is set out that, "a stock of merchandise amounting to about \$24,800," (so it appears in the schedule) "was on or about the 26th of March, 1908, turned over to Peoples Bank, Ozark, Ark., for benefit of my creditors; also horse and buggy, wagon, two mules, stock in Ozark Light Company, and about \$5000 R. R. ties; 12 shares stock in Telephone Company of Ozark. All books and papers turned over to said bank, \$21,200." So that whether the claim of the Peoples Bank was about \$20,000, or about \$17,000, is not clear.

The oral testimony in the case does not specifically give the date at which this sale was made. It does appear, however, from the testimony that this sale was arranged for on this 22nd of March, 1908, in the interview between Beuckman, Turner and Boggy, and apparently under the advice of Judge Reed. It furthermore appears by the oral testimony of defendant and of Mr. Turner, that in point of fact the sale of the merchandise, etc., was made, not to the bank, but to a firm called Conatser, Hill Company, composed of M. B. Conatser and a Mr. Hill and a Mr. Tolleson, Conatser at that time being the president of the Peoples Bank, and the proceeds of the sale turned over to the Peoples Bank. According to the testimony of Mr. Boggy and of Mr. Turner it was then known that not only did Beuckman have St. Louis creditors, who were listed, but also creditors in other places, and that he owed the Peoples Bank a large sum. At that meeting at Fort Smith on March 22, 1908, according to the testimony of defendant, Mr. Boggy had first insisted that his firm should be paid, after first trying to have the whole amount paid, seventy cents on the dollar. When Boggy found he could not get that he finally wanted 60 per cent, and when he could not get that, "Finally," (as the defendant testified) "we agreed at fifty-five cents. I objected to that but I couldn't do anything better." Mr. Boggy insisted on this extra five

cents for his firm because, according to Beuckman, Bogy said, "He had taken a lot of trouble and so forth and so on and he thought he was entitled to more than anybody else." According to Mr. Bogy, and in this he is not contradicted by anybody, he (Bogy) induced the cashier of the Peoples Bank to agree to pay the creditors a certain percentage on the dollar and take over the assets. The cashier of the bank testified that he, for his bank, finally consented to advance money enough to pay the creditors fifty cents on the dollar and to give the Ferguson-McKinney Dry Goods Company 5 per cent extra to pay Bogy's expenses and the attorney's fee, provided he (Bogy) could get the creditors to accept this settlement, which Bogy undertook to do. That is also Mr. Bogy's testimony as to the transaction and it is not denied by any other witness specifically. Mr. Bogy testified that he paid Judge Reed \$200 for his services as attorney in arranging the matter, which was included in this extra 5 per cent. With this arrangement made between the parties Mr. Bogy returned to St. Louis, apparently the evening of that same day, and the next day, March 23rd, at St. Louis, drew up what is relied upon as the composition agreement in this case, by which those signing agreed to accept fifty cents on the dollar of their respective accounts, to be paid in cash by the Peoples Bank of Ozark as payment in full of all demands against said George O. Beuckman, it being stipulated that the agreement was not to be binding unless all the creditors agreed to accept.

Creditors, whose account aggregated about \$10,095.04, the plaintiff signing through Bogy for \$7623.34, signed this and all were paid 50 per cent on their accounts, the payments made through drafts on Beuckman, through the Peoples Bank of Ozark, or through drafts on the bank, the Ferguson-McKinney Dry Goods Company, however, receiving not only 50 per cent on the \$7623.34 of its account but also an additional 5 per cent, amounting to \$381.16, a total of \$4192.83.

Plaintiff drew a sight draft on defendant, of date March 25, 1908, payable to the order of the Peoples

Bank for collection. This draft is not marked as having been paid, but under the same date it appears that plaintiff made out its account against Beuckman, showing \$7623.34 as due, and attached to the account was this: "Received of Peoples Bank, Ozark, Ark., four thousand one hundred ninety-two & 83-100 (\$4192.83) as payment in full of above account."

According to the testimony of defendant, his indebtedness to the Peoples Bank at that time was about \$20,000, in round numbers, and he testified that using the proceeds of the sale of his stock for the settlement with creditors and the Peoples Bank, that bank received about fifty cents on the dollar on its claim. That statement is hardly consistent with other testimony in the case, particularly in connection with that furnished by the schedule filed by defendant in his bankruptcy proceeding, and the testimony of the cashier of the bank. It would seem from an examination of this testimony that the signing creditors, including plaintiff, if paid at the rate of fifty cents on the dollar, should have received something over \$5000, which would leave about \$12,700 for the bank to apply on its claim of something over \$20,000. Even with this claimed excess payment of 5 per cent., amounting to \$381.16, and which included the \$200 paid the attorney, and leaving \$181.16 to apply to the traveling and other expenses of Mr. Bogy, it would seem that the Peoples Bank realized considerably more than 50 cents on the dollar of its own claim. However that may have been, it is very clear that the money which paid the extra five per cent was the money of the Peoples Bank and not the money of the defendant. By turning over the proceeds of the sale of his stock to the bank in the manner in which that was done, the defendant lost all interest in it, beyond the right to have the bank account to him for its proper distribution. It follows therefore that in so far as this \$381.16, which forms part of the \$1181.16 demanded in the counterclaim, defendant certainly cannot recover.

The remainder of that counterclaim is based on the payment of \$828.45 made on the account on April 14, 1908.

Reverting back to the transaction between the parties which took place at Fort Smith on March 22, 1908, we have seen that according to the testimony of defendant and after it had been agreed to give plaintiff fifty-five cents on the dollar, as before stated, Mr. Bogy insisted that defendant should give his note for whatever balance there might be over and above what he then paid. Without interest that would require a note in the sum of about \$3431. Bogy asked him, according to defendant, if he could not pay all of plaintiff's account in full and give them what he could when he sold his house. Defendant apparently assented to this, but it does not appear that any note was then given. Defendant apparently then returned to his home and it appearing that his wife, Mrs. Ebba L. Beuckman, who was the owner of the house in which they lived, also situated in Arkansas, sold this house—for how much does not appear. It does appear, however, that as either in full or as part of this transaction the purchaser, one Howard, gave a draft or check on the Peoples' Bank of Ozark, Arkansas, payable to the order of Mrs. Ebba L. Beuckman for \$1432. The abstract does not give the date of this draft or check, but it is indorsed by the Central National Bank of St. Louis, April 9, 1908. With this draft in his possession, indorsed in blank by Mrs. Ebba L. Beuckman, the defendant came to St. Louis, went to the business house of plaintiff, with whom it seems he was then employed, and handed this check so indorsed in blank by his wife to Mr. Ferguson, the president of the plaintiff company. He asked Mr. Ferguson if it was necessary for him (Beuckman) to indorse it. Mr. Ferguson told him it was not necessary, that they would have Mr. Baggott, who was an employee of plaintiff, attend to its collection. He thereupon called Mr. Baggott in and handed this draft to him and told him to take it and have it cashed. Mr. Baggott apparently did this at the Central National Bank of St. Louis, writing over the signature of Mrs. Beuckman the words, "Pay to the order of A. F. Baggott," and then indorsing the draft in his own name.

It was indorsed as paid by the Peoples Bank, April 11, 1908. So it is pretty clear that Beuckman turned this check or draft over to plaintiff about April 9, 1908. Defendant testifies that a few days afterwards and after the plaintiff had found that the check was good and had cashed it, as he supposed, Mr. Ferguson called him into the office, Mr. Bogy then being present but not having been present when Beuckman handed the draft over to Ferguson in the first instance, whereupon the defendant appears to have signed a note for about \$2800, according to plaintiff's account of date December 5, 1912, for \$2802.06, the note dated April 15, 1908. Deducting from what he then owed plaintiff the difference between the original amount and the amount which defendant then paid plaintiff out of the draft, which ought to have been \$832, but as shown by plaintiff's account of date December 5, 1912, was \$828.45, Mr. Ferguson or Mr. Bogy handed over to the defendant about \$600 out of the \$1432 realized on the draft, crediting defendant with the difference. It is for about this amount that the remainder of the counterclaim is made up.

We think that under the facts in the case, this must be considered as a voluntary payment and cannot be recovered, even conceding but not deciding, that this draft then belonged to defendant. It is claimed as to that by the learned counsel for plaintiff below that as that draft was the property of the wife, under our statute, it could only become the property of defendant by his wife's express direction in writing authorizing him to take it into his possession. Authorities are cited to the effect that the mere blank indorsement by the wife is not sufficient to vest title in the husband. That point, however, we need not and do not decide. We proceed on the assumption that the draft belonged to defendant and that out of it he paid this \$828.45 or \$832 on his account. It will be observed that this occurred about the 9th of April, sometime after the so-called composition arrangement of March 23, 1908, had been executed, and as far as the evidence tends to show after all the parties signing

it had been paid their 50 per cent, or the amount that they had received, and had executed releases for any balance. Their releases are dated March 25th, others March 26th, some March 30, 1908, none, as we recall, later. There is no evidence of any compulsion, fraud or duress practiced upon defendant in having him pay over this \$832.

In the very lucid opinion of Circuit Judge SANBORN speaking for the United States Circuit Court of Appeals of this Judicial Circuit, in *Crowder v. Allen-West Commission Co.*, supra, that learned judge, at page 525 has very concisely stated the rule which we think here applicable: "The debtor may recover back the excess which he has paid to the preferred creditor above the fixed percentage before the composition was made, and the excess he has been compelled to pay thereafter. But he may not recover anything which he has voluntarily paid after the composition was made pursuant to his agreement with the preferred creditor."

In that it ignored the question of lack of coercion under which defendant paid over the money sought to be recovered by the counterclaim, and in fact, while purporting to cover the facts necessary to a recovery on the counterclaim, the learned trial judge committed no error in refusing the second declaration of law asked by defendant and purporting to cover the counterclaim.

Our conclusion on this counterclaim is, that the action of the learned trial judge in declining to allow it in favor of defendant is supported by substantial evidence and is warranted by the law under the facts in the case. In the view we take of the case we do not think it necessary to pass on the point made by counsel for plaintiff, that in failing to include the claim now made for the amount covered by the counterclaim in his schedule of assets filed in the bankruptcy proceedings, defendant cannot now assert it.

Upon the whole case we hold that the judgment, in so far as it finds for defendant on plaintiff's cause of action is correct and should be affirmed, and that

the judgment on the counterclaim against the defendant and in favor of plaintiff is also correct and should be affirmed.

It is accordingly so adjudged, further adjudging that the costs of the appeal be taxed equally against the respective parties. *Allen and Becker, JJ.*, concur.

STATE OF MISSOURI, at the Relation and to the use of JENNIE O'DONNELL, Respondent, v. JOHN C. BOEPPLE, Defendant, CHANNEY C. CRAWFORD et al, Appellants.

St. Louis Court of Appeals. Submitted on Briefs October 2, 1917. Opinion Filed November 6, 1917.

1. **SHERIFFS AND CONSTABLES: Liability on Official Bonds for Assault: Sufficiency of Petition.** A petition, in an action on the official bond of a constable, which sets out that the deputy in executing a writ of replevin in his hands, had violently assaulted the defendant in the writ, states a good cause of action.
2. ———: **Official Bonds: Action: Evidence: Sufficiency.** In an action on the official bond of a constable for injuries alleged to have been inflicted by his deputy on relator when the deputy was executing a writ of replevin, evidence *held* sufficient to take the case to the jury.
3. **TRIAL PRACTICE: Instructions: Refusal.** The refusal of requested instruction covered by those given is not error.
4. **APPELLATE PRACTICE: Review: Verdict: Weight of Evidence.** Where there was evidence sufficient to sustain the verdict for plaintiff, the weight and sufficiency of the evidence cannot be reviewed on appeal, and the verdict must be upheld, not having been interfered with by the trial court.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. Rhodes E. Cave*, Judge.

AFFIRMED.

Thos. J. Rowie, Jr., for appellants.

(1) The petition herein fails to state facts sufficient to constitute a cause of action. State ex rel. Hamilton v. May, 177 Mo. App. 717. (2) The court should have given defendants' instruction at the close of the entire case, that under the pleadings and proof plaintiff could not recover. (3) The court erred in refusing to give defendants' instructions. (4) The verdict is against the overwhelming weight of the evidence and must have been the result of bias, prejudice and passion.

Charles A. Lich for respondent.

(1) "A sheriff is responsible for all trespasses committed by a deputy by color of his office." State ex rel v. Moore, 19 Mo. 369; State ex rel. v. Claudius, 1 Mo. App. 551; State ex rel. v. Muir, 20 Mo. 303. In their brief appellants contend that any assault which may have been committed in this case was not under color of office, and in support of this very astonishing contention, they cite the case of State ex rel. v. Dierker, 101 Mo. App. 636. (a) The courts have discoursed on what constitutes color of office in the following, which are a few of the many cases on this point: Warrensburg v. Miller, 77 Mo. 56; State ex rel. v. Shacklett, 37 Mo. 280; State ex rel. v. Claudius, 1 Mo. App. 551; State ex rel. v. Lindsay, 73 Mo. App. 472; State ex rel v. Barnett, 96 Mo. 133. (b) "In construing an official bond that construction should prevail which, in the light of attendant circumstances, would make the instrument efficacious, instead of meaningless and ineffective." State ex rel. v. Miserez, 64 Mo. 596. (c) "A constable who executes a writ of restitution in forcible entry and detainer within ten days after rendition of judgment, commits a trespass, for which he and his sureties are liable." State ex rel. v. Weinel, 13 Mo. App. 583. And also in the following cases the courts have held the bond liable for trespass committed by a constable. State ex rel. v. Hadlock, 52 Mo. App. 297; State ex rel. v. Romer, 44 Mo. 99; Parketon v. Pagsley, 142 Mo. App. 537, Bank v. Terrill, 136 Mo. App. 472. "Constable held liable for failing to apprise defendant of his exemption rights,

and bond held liable." State ex rel. v. Lindsay, 73 Mo. App. 472; State ex rel. v. Barnett, 96 Mo. 133. (2) "The verdict of the jury will not be set aside if supported by substantial evidence, on the ground that the opposing evidence greatly preponderated." Johnson v. Barnes, 23 Mo. App. 546; Blumenthal v. Torrino, 40 Mo. 159; McFarland v. Ins. Co., 124 Mo. 204; State v. Bryant, 134 Mo. 246. (a) "If there is conflicting evidence in an action at law, and the issues are correctly submitted, the verdict ends the controversy." Grove v. K. C., 75 Mo. 672. (b) "It is the province of the jury to pass upon the credibility of witnesses and weigh the evidence." Freeman v. Pratt, 66 Mo. App. 283. (c) "The court cannot assume that a verdict is necessarily the result of bias or prejudice, because opposed to the weight of the evidence." St. Louis Brewing Assn. v. Stemke, 68 Mo. App. 52. (d) "Appellate court will not reverse the judgment simply because the jury appear to have disregarded evidence since they may have discredited it." Gregory v. Chambers, 78 Mo. 294. (e) "The appellate court will not review the sufficiency of the evidence, unless there is an entire failure of proof." State v. Fisher, 124 Mo. 460.

REYNOLDS P. J.—This is an action on the official bond of John C. Boepple, constable of the fourth judicial district of the city of St. Louis, on which Chauncey C. Crawford and Joseph E. Sippy are sureties, the bond having been duly approved. It is in ordinary form, conditioned that Boepple "will execute all process to him directed and delivered and pay over all money received by him by virtue of his office, and in every respect discharge all the duties of constable according to law."

It is charged in the petition, after setting out the official character of the constable, that a writ of replevin, directed against the relator and in favor of a piano company named, commanding the constable to take possession of a piano described, was placed in the hands of one Willmore, his duly appointed deputy; that with this writ in his possession, the

deputy proceeded to the store and residence of the relator in the city of St. Louis, entered the premises for the purpose of seizing the property described in the writ, read the writ to her, and being informed by her that she had no such piano in her possession, the deputy pushed the relator from a counter, on which she was leaning, against the opposite wall in so rough and violent a manner that she was seriously and severely injured, in that stitches in her abdomen, which were inserted after an operation on a previous occasion were broken and torn loose, causing relator to be internally injured; that the deputy had threateningly and without cause thrust a revolver in relator's face and later directed his assistants to remove the piano from her premises; that in so acting the deputy had not discharged his duty according to law but by his violent, careless, wanton, cruel and inhuman acts, had exceeded the authority vested in him by law, and that thereby relator had been physically injured as above stated; that the mental strain upon her had caused her to become a nervous wreck and that in consequence of her physical and mental sufferings, relator had been compelled to expend \$300 for medicines and medical treatment and had been severely and permanently injured and damaged in the sum of \$10,000. Judgment is prayed for the penalty of the bond, \$5000, and execution for the full amount and costs.

There was a second count to the petition but that was dismissed at the trial.

Defendants demurred to the petition, which demurrer being overruled, defendants answered jointly, admitting that the defendant Boepple is the duly elected, qualified and acting constable of the fourth district and that the defendants Crawford and Sippy were the duly qualified and accepted bondsmen on the bond of the constable, but deny all other allegations in the petition.

The cause was tried to the court and a jury and a verdict rendered in favor of relator in the sum of \$700. Judgment followed for the penalty of the bond and

awarding execution for the damages, from which, interposing a motion for new trial, as also a motion for judgment *non obstante veredicto*, and these motions being overruled, the defendant sureties have duly appealed to our court.

This is the second time this case has been before our court. The opinion then rendered is not to be officially reported, but will be found under the same title in 184 S. W. 1166. In that case relator here obtained a judgment for \$4150, which was set aside by the trial court as excessive. From that action plaintiff appealed and we affirmed the action of the trial court. No point was there raised or decided as to the sufficiency of the petition.

The errors here assigned are, first that the petition fails to state facts sufficient to constitute a cause of action. Second, that the court should have given an instruction at the close of the case that under the pleadings and proof plaintiff could not recover. Third, that the court erred in refusing to give defendants' instructions, and, fourth, that the verdict is against the overwhelming weight of the evidence and must have been the result of bias, prejudice and passion. Of these in their order.

In support of the first error assigned we are referred to the decision of our court in *State ex rel. Hamilton v. May*, 177 Mo. App. 717, 160 S. W. 1030. We do not think that the facts in that case bring the case at bar within the decision there made. The point in decision in the May Case was that the sureties of the constable were not responsible on his bond for the negligent acts of the constable in executing a writ of replevin. There it was charged that by the officer negligently leaving a door open while he was taking out some property from the premises, an infant child of the relators, then in the premises, had contracted pneumonia from which it died. We there held that such negligence was not a failure on the part of the constable to discharge his duties according to law, but was negligence for which the sureties were not liable. The facts, as set out in the petition in the case at bar, do not

bring it within those in that case. Here it is charged in the petition that the officer, with the writ in his hand, entering the premises of relator to serve and enforce it, had violently assaulted the relator, defendant in the writ, pushed her down, drew a revolver on her and indulged in violent and abusive language. We hold that these acts, as they are set out and charged in the petition, were, if committed, a violation of that condition of the bond, which required the constable, and of course his deputy for whose acts he is responsible, "in every respect (to) discharge all the duties of constable according to law." Surely the constable, or his deputy, was not discharging his duties "according to law," if, as charged in the petition, he made a violent attack upon the person of relator. An officer with a writ in his hand, so acting, if it be true that he did so act, violated this condition of his bond. We therefore, hold that the petition does state facts sufficient to constitute a cause of action.

The second assignment of error, that a demurrer should have been sustained at the close of the case is not tenable. By her own testimony the relator made out her case as pleaded and it was sufficient to take it to the jury.

The third assignment of error is on the refusal of the court to give an instruction to the effect that the burden was on plaintiff to prove, by a preponderance of all the evidence in the case, that the deputy unlawfully pushed plaintiff from a counter on which she was leaning, across the room and against the opposite wall, and that thereby she was injured and that unless the plaintiff, meaning relator, by a preponderance of all the evidence in the case, proved each and every one of said facts, the verdict of the jury must be in favor of defendant. It is argued that this was a correct declaration of law under the pleadings in the case and that it was error for the trial court to refuse it. It would have been improper to have given this instruction, but its refusal in view of the instruction given by the court at the instance of relator, was not

reversible error. The court placed the case so plainly and clearly before the jury by the principal instruction given that the refusal of this is not reversible error.

The final error assigned, that the verdict is against the overwhelming weight of the evidence and must have been the result of bias, prejudice and passion, cannot be sustained in view of the action of the learned trial court in submitting the case to the jury and in view of the positive testimony of the relator herself. It is true that her testimony was in some respects contradictory with itself, and it is also true that the deputy, his associate, two policemen and possibly one or more witnesses, testified that no such occurrence as described by relator had taken place. But it is to be observed that it appears by the evidence in the case that all of these other witnesses came in after relator claimed that the alleged assault had been made upon her by the officer and were not present at the time; that after the deputy constable had alone entered her premises, he commenced reading the writ. Relator, not understanding that he was a constable, and thinking he was trying to sell a piano, told him she did not want to buy one. When he explained that he had a writ to take a piano out of her possession, she told him that the piano she had was not of the make of that described in the writ; that she had a good piano, which she had paid for; that the deputy thereupon, in the language of the witness, "gritted his teeth, rolled his eyes. He said, 'I am going to take your piano. I have got you. You can't resist me.' " Witness testified that she did not know whether he was a madman or what. She came around the counter in her store and said, "You can't take anything in my store. Everything I have got is paid for," and with that, and as she was leaning on the counter, the deputy "grabbed hold of me and fired me and I landed against the wall on the opposite side and broke all of the stitches where I was operated on five years before, and he threwed a revolver in my face." She testified that at the time the deputy entered she was standing behind the counter waiting on a lady; that the constable told this lady to get out; that he then took hold of both of relator's hands and she repeated, "fired

me as hard as he could throw me. . . . He grabbed me like that (illustrating) and gritted his teeth," throwing her across the length of the store. When she struck the wall she fell against the floor; tried to catch herself but couldn't; had fallen against the partition or wall; after that, she testified, the deputy got the piano, first going to the door and calling some men who came in, three or four of them; that, she said, was after he had pushed her and pointed the revolver.

A witness for relator, the young woman referred to, testified that she was in the milinery store of relator on the day named; that a man came in, who she identified as the deputy, and told her to get out of the store, which she did.

There was testimony elicited from relator and from other witnesses tending to show that on a previous trial relator had given testimony inconsistent with the testimony here given. There were a number of witnesses produced on the part of defendant, to the effect that they had gone into the store with the deputy and had neither seen any assault nor heard the officer make the remarks charged, but relator testified that the assault upon her had been made by the deputy when she and he were alone and that the others came in afterwards; that after the occurrence between relator and the deputy, the deputy had gone out and brought in the others.

In case after case it has been held that in an action at law we, as an appellate court, cannot weigh the testimony; conflicts in it, even contradictions which a party may have made in their own testimony, are all matters for the determination of the jury as to where the truth lies. We, on appeal must accept the testimony for plaintiff, where the verdict is not interfered with by the trial court. Its weight and probative value is for the determination of the jury, in the first instance, then for the trial court. The judgment of the circuit court is affirmed. *Allen and Becker, JJ.*, concur.

DEE BROWN, Respondent, v. QUINCY, OMAHA and
KANSAS CITY RAILROAD COMPANY, Appel-
lant.

Kansas City Court of Appeals, November 5, 1917.

1. **NEGLIGENCE: Stock Killed on Track: Pleading: Common Law and Statutory Negligence.** Where there are two causes of action embraced in one count for the killing of a cow on a railroad track, one for negligently failing to maintain a proper and reasonably safe cattleguard as required by the statute and one at Common Law charging that the cow strayed upon the railroad track where it was not fenced and the railway employees negligently and carelessly ran over said cow and the evidence is sufficient to support the verdict of the jury, the judgment thereon will not be disturbed.
2. **RAILROADS: Damages from Back Water and Overflow: Statute of Limitations.** A cause of action for damages for overflow and back-water caused by a railroad embankment which accrued within five and more than three years before the institution of suit is not barred by the three year Statute of Limitations (Sec. 1890, R. S. 1909), as that statute is both penal and remedial and the cause of action, being placed safely under the remedial part thereof, is controlled by the five year period of the statute (sec. 1889, R. S. 1909).
3. **JUDGMENTS: Several Counts: New Trial.** A judgment, in a case involving several counts, may be reversed and carry with it a count found on appeal to be properly decided and that the verdict on such count will stand without retrial of that count, and when the entire case is finally determined, a judgment on that count may be entered.
4. **RAILROADS: Damages from Overflow and Backwater: Assignability of Causes of Action.** Claims for damages due to overflow and back water caused by a railroad embankment are assignable.
5. ———: **Constitutional Questions: Should be First Raised in Trial Court.** Constitutional questions injected into a case for the first time after a rehearing is granted in the appellate court are raised too late. Such questions should be first raised in the trial court.
6. ———: **Instructions: Ambiguity of Instructions.** An instruction, which while not intended, is so worded that it might be taken to mean that if *any* of the overflows were caused by the negligence of the railroad the jury should find for plaintiff on all of them, is erroneous.

Appeal from Grundy Circuit Court.—*Hon. G. W. Wanamaker*, Judge.

REVERSED AND REMANDED.

J. G. Trimble and Hall & Hall for appellant.

Platt, Hubble & George H. Hubble for respondent.

BLAND, J.—Plaintiff brought two actions against defendant. The first consists of a petition in six counts; the second, a petition in four counts. These petitions were consolidated and tried as one action. All the causes of action except the first were assigned to plaintiff. The judgment was for plaintiff on all the counts.

The first count is for killing plaintiff's cow. This embraces two causes of action, one for negligently failing to maintain a proper and reasonably safe cattle guard as required by statute, which "thereby caused the killing of one red, white-faced cow," whereby he was damaged in the sum of sixty (\$60) dollars. The second cause is at common law and alleged that the "cow walked and strayed onto the defendant's track where the same was not fenced and defendant, by its servants, negligently and carelessly ran its engine and cars over said cow, and negligently and carelessly struck and killed said cow," whereby he was damaged in the sum of sixty dollars.

The remaining five counts of the first petition and the four counts of the second petitions are for overflows, or backing up of water onto the lots of plaintiff's assignor; one count for each year from 1907 to 1915 inclusive.

It seems that plaintiff's assignor (who is his father) owned two lots in the village of Brimson in Grundy county. The counts are founded on the allegations that there runs through the lots a small branch (dry except after rains) which is a natural drainage for a small district in that vicinity. But that defendant so constructed its roadbed and embankment as to dam the water below the lots and cause it to "back up" and overflow the lots, doing damage to grass, chickens, eggs, etc. The allega-

tions are that defendant negligently failed to put in and maintain openings through and across its right of way and roadbed so that there would be a sufficient outlet and drain to carry off the water of the branch and other surface water, but left the same so as to be dammed up by such railroad bed. That but for such negligent failure the surface water and that collected in the branch would have found its natural flow without injury to plaintiff's assignor as it had before defendant's road was built. Each overflow count contains a proper allegation of an assignment to plaintiff.

All of the overflow counts are based on section 3150, Revised Statutes 1909, though only three of them ask judgment for the two hundred dollars penalty provided for in such statute, and plaintiff's instructions confined his recovery to damages without the addition of the penalty of two hundred (\$200) dollars allowed by that statute.

The objection that the first count for killing the cow is defective in that it joins both statutory negligence as to the cattle guard and common-law negligence must be overruled. [White v. Railroad, 202 Mo. 539, 560, 561.] We are of the opinion that there was evidence under that count upon which the verdict of the jury may be supported.

The action as to the overflow is conceded to be brought under the statute. That statute makes it the duty of the railway company to provide drains along the sides of its tracks and suitable openings through the roadbed to afford sufficient outlet for surface waters wherever the drainage has been obstructed by the construction of the road. The statute provides that any railway company "failing to comply with the provisions of this section shall incur a penalty not to exceed two hundred dollars and be liable for all damages done by said neglect of duty, and each neglect of duty shall be a separate offense."

The cause of action accrued on all the counts within five years before the institution of the action, but three of them accrued more than three years before bringing the action. Defendant pleaded against the latter the Stat-

ute of Limitations (section 1890, R. S. 1909) barring certain actions within three years. It reads: ". . . . Second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State." Defendant's claim is that the statute is penal.

Our opinion is that the statute is both penal and remedial. Each action is separately provided for. The remedial portion is for the sole benefit of the party aggrieved, and, as has been decided by the Supreme Court (*Skinner v. Railroad*, 254 Mo. 228) the penal part for the School fund. There may be a remedial clause and a penal clause in the same section of a statute, and in such case each may receive the construction which its class may demand. [Endlich on Interpretation of Statutes, sec. 332; 2 Lewis' Sutherland Statutory Construction, sec. 532; *Huntington v. Attrill*, 146 U. S. 657, 667.] So the appropriate part of the Statute of Limitations should be applied to each clause. The three year statute above quoted has been held to apply to an action for double damages against a railroad for killing stock. [*Revelle v. Railroad*, 74 Mo. 438.] But that was on the ground that the statute in allowing double damages was penal, while we have seen that that part of the section upon which this action is based is only remedial. There is another part of the section imposing double damages for injury resulting from failure to clean, burn and remove from the right of way, twice a year, all dead vegetation, so as to prevent spread of fires; but that part is distinct from the duty and liability as to drainage, and a failure to discharge the latter duty does not authorize double damages.

A part of defendant's argument is based on *McFarland v. Railroad*, 175 Mo. 422, wherein it is held that the penalty of two hundred dollars prescribed in this statute, as well as the damages, is recoverable by and payable to the injured party; and hence it is claimed that since both damages and the penalty go to the party aggrieved, as in stock cases where no fences had been built (*Gorman v. Railroad*, 26 Mo. 441; *Barnett v. Railroad*, 68 Mo. 56), the three years limitation for penal actions applies. But the

McFarland case is overruled in *Skinner v. Railroad*, *supra*, wherein, as we have stated, it was decided the penalty went to the school fund, and hence defendant's point is left without support.

Besides, even if the penalty of two hundred dollars prescribed in the statute here involved was recoverable by the aggrieved party along with his damages, yet the right would not rest on the same ground with the penalty in double damage stock cases prescribed for failure to fence. There is no common-law obligation resting on a railway company to fence its tracks and the action arises solely on the statute; but there is a common-law action against one who gathers the surface water and floods his neighbor. In such cases where the statute gives the same right as existed at common law, and merely increases the damages by adding a penalty payable to the party aggrieved, it is not a penal statute. [*Ellis v. Whitlock*, 10 Mo. 781, 783.] And is not governed by the Statute of Limitations as to penal actions. [*Hall v. Hall*, 112 Maine, 234; *City of Atlanta v. Chattanooga Foundry*, 127 Fed. 23, 29; *Meeker & Co. v. Lehigh Valley R. R.*, 236 U. S. 412, 423.]

Having determined that the statute in one part is penal, but in another separate and distinct part is remedial; and having shown that as the penalty goes to the school fund, plaintiff can have no interest in the penal part, it must follow that his action is where he placed it at the trial, solely under the remedial part, not limited by the Statute of Limitations as to penalties but controlled by the five year period of that statute. [Sec. 1889, R. S. 1909.]

There is this additional phase presented in plaintiff's case: In three counts he asked the imposition of the penalty part of the statute, but disclaimed it at the trial. We assume the reason he abandoned the claim was that he learned the Supreme Court had overruled *McFarland v. Railroad*, wherein he was given a right to such penalty by deciding, in *Skinner v. Railroad*, that he had not such right. We think a plaintiff in such case may abandon an untenable, separable and distinct part of his claim without harm to the proper part.

The verdict and judgment as to the first count for killing the cow is approved as there is no longer any controversy in reference to the same.

It seems that on the authority of *Scott v. Realty Co.*, 241 Mo. 112, 122, a judgment in a case involving several counts may be reversed and carry with it a count found on appeal to be properly decided and that the verdict on such count will stand without retrial of that count, and when the entire case is finally determined, a judgment on that count may then be entered for the plaintiff.

Defendant insists that the action could not be assigned. We think the point not well made. Such rights of action have been held to be assignable since *Snyder v. Railroad*, 86 Mo. 613; *Remmers v. Remmers*, 217 Mo. 541; *Coffman v. Railroad*, 183 Mo. App. 622. An action for trespass for cutting timber in which treble damages were sought was held assignable. [*Chouteau v. Boughton*, 100 Mo. 406, 410.]

The constitutional question attempted to be injected into the case by defendant after the granting of the rehearing herein, is raised for the first time too late. If the statute sued on is unconstitutional, that point could have been raised in the lower court.

We think defendant's criticism of plaintiff's instruction No. 4 concerning the counts for overflows, on the ground of ambiguity and liability to mislead is well taken. While it was, of course, not intended, yet the instruction is so worded that it might be taken to mean that if *any* of the overflows were caused by defendant's negligence the jury should find for plaintiff on all of them.

Instruction No. 7 is faulty. After reciting that plaintiff "is not entitled to have the damage done assessed twice, but would be entitled to have it assessed once." it continues thus: "that is to say, if the jury find for plaintiff you will assess such damages on each count, according to the measure," etc. That might well be

taken to mean that if the jury found for plaintiff at all, they would assess damages on each count.

The judgment will be reversed and the cause remanded. All concur.

IDA W. CULP, Appellant, v. SUPREME LODGE,
KNIGHTS OF PYTHIAS, a Corporation, Respondent.

Kansas City Court of Appeals, November 5, 1917.

1. **NEW TRIAL: Number of New Trials: Errors of Law: Weight of Evidence.** Section 2023, R. S. 1909, allowing only one new trial to either party except in case of error in a matter of law or misbehavior of the jury, imposes no limit on the number of new trials granted on account of errors committed during the trial. Said section means that a party is entitled to one new trial solely on the ground that the verdict is against the weight of the evidence if the trial court is of the opinion that such is the case; but he is forbidden from getting a second new trial on that ground or from getting a new trial twice on a ground not coming within the exceptions of the statute.
2. ———: ———: ———: ———. A new trial was granted defendant for error in admitting evidence offered by plaintiff, for error in excluding evidence offered by defendant and because the court thought the verdict was against the weight of the evidence. After a change of venue a new trial was had and a verdict returned for plaintiff which the court set aside because the jury "disregarded the law" given in defendant's instruction. *Held*, that even if this can only be construed to mean that the verdict is against the weight of the evidence, still, as defendant's right to have the first new trial was complete because of the errors of law committed therein, defendant is not precluded from the benefit of the second new trial because the first court inserted, as an additional reason for granting the first new trial, that the verdict was against the weight of the evidence, since defendant had not exercised its right to have one new trial solely because the verdict was against the weight of the evidence. The first court was not in a position to say, once for all, that the verdict was against the weight of the

evidence since the case was not tried that time upon the proper evidence.

Appeal from Clinton Circuit Court.—*Hon. Alonzo D. Burns*, Judge.

AFFIRMED.

E. E. Aleshire, S. M. Young and F. B. Klepper for appellant.

L. W. Reed, R. H. Musser, New, Miller, Camack & Winger and *S. J. McCulloch* for respondent.

TRIMBLE, J.—This is an action on a certificate of life insurance, dated May 1, 1912, issued to and upon the life of Clyde L. Culp by defendant, a fraternal beneficiary society, with the plaintiff, Ida W. Culp named therein as beneficiary.

The defense was that insured, in procuring the certificate, had made false and fraudulent representations in regard to his health; also that shortly after the policy was issued, and as soon as the misrepresentations were discovered by the defendant, it, on notice to the insured and after opportunity given him to be heard, canceled the policy because of said misrepresentations and notified insured of that fact and returned to him his premium; all of which was done pursuant to defendant's by-laws which insured had agreed should constitute a part of the insurance contract along with the application and certificate.

A trial in the circuit court of Clinton county resulted in a verdict for plaintiff in the full amount of the policy with interest. Defendant's motion for a new trial was sustained, the order reciting that it was done "on the sole ground that the jury disregarded the law given by the court in instruction number one (1) for the defendant." Plaintiff appealed.

Instruction No. 1 for defendant, which the court says the jury disregarded, is as follows:

"The court instructs the jury that if they find and believe from the evidence that after the execution and delivery of the policy in controversy, and after the defendant company obtained knowledge of misrepresentation and fraud, if any, by the applicant, the defendant company, in compliance with by-laws of said company, gave to said Clyde L. Culp, thirty days' written notice to show cause to the Board of Control of defendant company why said policy should not be cancelled, and that such notice was given said Clyde L. Culp by registered United States Mail at his then known post office address, and that said Culp had an opportunity to be heard before said Board of Control and failed to appear, or ask to be heard, or defend against cancellation of the said policy, and that said Board of Control, after a hearing directed the cancellation of the policy in this suit, and notified said Culp of said cancellation, then the policy became thereby null and void, regardless of any waiver by defendant company as to false representations, if any, and your verdict must be for the defendant."

Appellant asserts that, in a former trial of the case in the circuit court of Clay county, that court set aside a verdict for plaintiff on several grounds, one of which was that the verdict was against the weight of the evidence. Her contention, therefore, now is that the action of the Clinton court, in granting a new trial on the ground that "the jury disregarded the law" given in the instruction quoted above, assigned no reason known to the law unless the said reason be construed as merely another way of saying that the verdict was against the weight of the evidence in support of the defense of cancellation; that the reason given by the court, when considered in connection with the instruction and the evidence on the issues before the jury, was tantamount to saying that the verdict was against the weight of the evidence, and, as section 2023, Revised Statutes 1909, forbids the granting of more than one new trial on that ground, the court could not do indirectly that which the statute forbade him doing directly.

It is a very grave and serious question whether plaintiff has properly preserved the alleged fact that the Clay circuit court, in granting a new trial to defendant gave as one of its reasons therefor that the verdict was against the weight of the evidence. If such action was taken, and the *reasons for granting* the new trial in the Clay circuit court are a part of the record proper the same as the *fact that a new trial was granted*, then, in order to preserve the reasons for which such former new trial was given, the appellant here should have printed, as a part of her abstract of the record proper, the record of the Clay circuit court showing such action. If, however, the *reasons* for which the former new trial was granted were mere matters of exception then the same should have been offered in evidence on the second trial and preserved by being incorporated in the bill of exceptions. It is clear that she did not include it in her abstract of the bill of exceptions and it is a question whether she has preserved it in her abstract of the record proper.

Plaintiff's abstract of the record proper begins with the petition as if the case originated in the circuit court of Clinton county. Then follows the answer, the reply, the record of the trial, the verdict and judgment in the Clinton circuit court, the motion for new trial filed by defendant, the sustaining of that motion for the reason given, the filing by plaintiff of an application and affidavit for appeal, the allowance thereof, the granting of time to file bill of exceptions, the filing thereof, and the duly filing of the appeal in the Court of Appeals.

This would seem to be the end of appellant's abstract of the record proper. On the next page is a statement to the effect that "In order that this court may understand more of the past history of this case, we are printing herewith, a short record coming from the clerk of the court of Clay county, Missouri." Then follows a statement of counsel that the case was originally tried in Caldwell county, from which, on a verdict for defendant, it was appealed to this court, was reversed and remanded, and a change of venue taken to Clay county where a verdict was obtained by plaintiff which was set

aside on motion for new trial for the reason stated in the record of the case; and that after that the judge of the Clay circuit court disqualified himself and the case went by agreement to Clinton county. The statement then says "the record referred to bears the following certificate." Here follows a copy of the certificate of the clerk of the Clay circuit court certifying that "the foregoing" is a full, true and complete copy of the record and proceedings in the case in that court. After this certificate comes this statement: "In this record we find the following:" Then follows what purports to be a copy of a part of a motion for new trial by defendant and then an order of court sustaining the motion on three grounds, one because of error in admitting evidence in behalf of plaintiff, another because of error in excluding evidence offered by defendant and a third because the verdict was against the weight of the evidence. Next is shown the record of the filing of a stipulation to transfer the case to the Clinton circuit court and following this comes a statement that the case was transferred to the circuit court of Clinton county. Appellant then starts off with her printed abstract of the bill of exceptions.

Looked at in one way it would appear as if the appellant had not abstracted the action of the Clay circuit court in her abstract of the record proper but had merely inserted between her abstract of the record proper and her abstract of the bill of exceptions an explanatory statement by counsel to the effect that it appeared from a certified copy obtained from the Clay circuit clerk, that a former new trial had been granted defendant for certain reasons, one of them being that the verdict was against the weight of the evidence. But while the abstract is somewhat confused and apparently misleading, yet, as the reasons are set forth in the order of the Clay circuit court granting the new trial, they became a part of the record proper that was certified on change of venue to Clinton county, and were a part of the record proper in the Clinton court, and hence are preservable, and should appear, in the abstract of the record proper

on this appeal. Now, inasmuch as there appears, along with the printed abstract of the proceedings in the Clay circuit court, a statement that said record certified to by the Clay circuit clerk reached Clinton county and was filed in that court as shown by the file mark thereon, as follows: "Filed September 11, 1916. A. E. Stone, Clerk Circuit court," we have come to the conclusion that this shows that what appellant is here abstracting is not a mere statement from counsel as to what was formerly done in the Clay circuit court, but is an abstract of the transcript sent from Clay county to the Clinton court and which is a part of the record therein. Hence we may properly regard the whole, both the record in the Clay as well as in the Clinton circuit court, as appellant's abstract of the record proper. If this be so, then we may properly take notice of the action of the Clay circuit court and of its reasons for granting defendant a new trial.

But, even so, is appellant entitled to have the action of the Clinton circuit court set aside and reversed? Section 2023, Revised Statutes 1909, which appellant claims the court violated, says "Only one new trial shall be allowed to either party except: First, where the triers of the fact shall have erred in a matter of law; second, when the jury shall be guilty of misbehavior," etc. The trial court says it granted a new trial because the jury "disregarded the law" as given in said instruction. If the trial judge, by reason of his opportunities of seeing and knowing what really took place in the trial court, says the jury *gave no heed to the law* as given by the court, can it be said that it *conclusively* appears that the jury did not refuse to follow the law but did refuse to *accept* the facts on which the application of the law rested? This may, perhaps, be the case if there is any substantial evidence controverting the facts upon which the law was predicated or if the evidence of those facts is such that the jury are not bound to believe it. However, we need not decide this question owing to the facts of this particular case. For even conceding, but without deciding, that the reason given by the Clinton court for granting the new trial can only be construed to mean that the ver-

dict is against the weight of the evidence, still, is appellant entitled, under the facts of this case, to have the court's action reversed?

It will be observed that the former new trial was granted by the Clay circuit court for *three* reasons herein above set out. And as the plaintiff abided that order we must regard defendant as being entitled to a new trial because of each one of the first two. In other words, defendant did not have a fair trial in the Clay circuit court because of error in the admission of evidence in plaintiff's behalf and also because of the exclusion of evidence offered in defendant's favor. Hence defendant was then entitled to a new trial on account of errors in matters of law. It is well established that section 2023 imposes no limit on the number of new trials granted on account of errors committed during the trial. [State ex rel. v. Horner, 86 Mo. 71; Langston v. Southern Electric R. Co., 147 Mo. 457.] Here, then, we have defendant entitled to and granted a new trial because of errors committed against it. It did not have a fair and legal trial, and is entitled on account of those errors to a new trial regardless of anything else. But it is entitled to *one* new trial *solely* on the ground that the verdict is against the weight of the evidence if the trial court is of the opinion that such is the case. And if the reason given by the Clinton circuit court must be taken to mean that the verdict is against the weight of the evidence, then, according to appellant's contention, the judgment granting a new trial must be reversed even though defendant was justly entitled to and was granted the first new trial on other grounds. Stated in another way, appellant's contention is really this: Although defendant was justly entitled to the first new trial on account of errors committed against it, and although defendant is entitled to one new trial where the verdict is against the weight of the evidence, nevertheless, defendant cannot now obtain the benefit of this right merely because the Clay circuit court inserted that as an additional reason for granting its new trial. We do not think that section 2023, as construed by the courts, means this. What is meant is that a party is entitled to one new trial where the verdict is

against the weight of the evidence, but he is forbidden from getting a second new trial on that ground, or from getting a new trial twice upon a ground not coming within the exceptions of the statute. In *Kries v. Missouri, etc., R. Co.*, 131 Mo. 533, l. c. 544, it is said: "A proper construction of the statutes gives the trial court the right to grant to either party one new trial on the ground of the insufficiency of the evidence to support the verdict of the jury, regardless of the number of new trials that may have been granted to such party upon other grounds." At the trial in Clay county the defendant, on account of errors committed, was entitled to a new trial, and such right was complete without regard to any additional reason which the court may have stated. And the insertion of such additional reason ought not to deprive the party of its right to one new trial solely on the ground that the verdict is against the weight of the evidence. For, since defendant's first trial was not legal because of errors committed by the court, defendant has not exercised its right to have one new trial solely because the verdict was against the weight of the evidence. Indeed, how can the first court be in a position to rightfully and once for all, say the verdict is against the weight of the evidence when concededly a portion of the evidence properly admissible was excluded and was not allowed to be laid before the jury? We think that under the facts in this case appellant has not shown a new trial granted the second time because the verdict was against the weight of the evidence within the meaning of the prohibition of the statute. If that is the case then the action of the trial court must be upheld if there is substantial evidence on which the court's action can be justified. [*Dorsett v. Chambers*, 187 Mo. App. 276, 280; *Pepper v. Pepper*, 241 Mo. 260.] As to that, there was abundant proof of misrepresentations and of a due cancellation of the policy on that ground and very slight proof if any in opposition thereto.

The judgment is affirmed. All concur.

CENTRAL MISSOURI TRUST CO., Respondent, v.
DIETRICK WULFERT, et al. Appellants.

Kansas City Court of Appeals, December 31, 1917.

1. **REPLEVIN: More Than One Defendant: Misjoinder.** In a replevin suit for two horses against two defendants, the latter plead misjoinder based solely on a lack of community of interest or title in the property, and not upon any claim as to who took the property or as to whose possession it was in at the time of the commencement of the suit and the issuance and service of the writ. Both defendants, in their testimony, admitted that at that time both horses were in possession of one of them. Hence, plaintiff was entitled to maintain replevin as to both horses had the suit been brought against that one alone. The other need not have been made a defendant, but as he sought to defeat the action by contesting plaintiff's title to one of the horses and made no claim that he should not have been sued because he was not concerned in the taking or withholding possession, nor that he innocently obtained possession from the other defendant, he is not entitled to be discharged from the case. If he did not join in taking the property he did join in withholding it and made the other's act his act as much as if he had gone with his co-defendant and took the animals.
2. ———: ———: ———: **Joint Judgment.** A joint judgment in replevin can be rendered only against parties shown to have a community of interest in the property or to have both been concerned in the taking or detention.
3. ———: **Demand When Necessary: Wrongful Taking.** Where the taking of the property is wrongful and the plaintiff has not consented thereto, no demand is necessary to enable him to maintain suit.
4. ———: **Sufficiency of Judgment.** Under section 2650, the judgment for plaintiff in replevin, based upon a verdict which assesses the value of the property taken and damages for its detention, should recite those facts and give the plaintiff the right to choose the property or its assessed value. But where the verdict did not assess any damages or value, and plaintiff is not asking for anything but the property, and the judgment goes no farther than to adjudge its return which can be affected since it is still in defendants' possession, the defendants cannot complain since they are not injured. Defendants should not complain because plaintiff did not obtain all it was entitled to.

Appeal from Jackson Circuit Court.—*Hon. Jack G. Slate, Judge.*

AFFIRMED.

Pope & Lohman for appellants.

Irwin & Haley for respondent.

TRIMBLE, J.—Plaintiff brought replevin to recover possession of a bay mare six years old, a bay horse nine years old and two red cows. The two cows were never found and, therefore, are not in the case.

Plaintiff held a chattel mortgage on certain property, including the property in question, given by one Julius Wulfert, to secure a debt he owed plaintiff. The mortgagor having become involved financially, and being unable to pay the debt when it became due, the mortgagee was authorized to take charge of the mortgaged property and began making arrangements to do so. Before it could take charge, however, the defendant, Dietrich Wulfert, caused the animals involved in this litigation to be removed to a pasture near his own farm. The mortgagor took charge of the rest of the mortgaged property, and, as the animals in controversy were not with said other property, sought for them on defendant Dietrich Wulfert's farm but did not succeed in finding or locating them. Thereafter, the two horses were brought from the pasture, where they had been placed, to the said Dietrich Wulfert's farm.

The defendants are father and son. The latter, Fred Wulfert, was a single man, and, when not engaged in government work on the Missouri river, made his home with his father.

The suit was commenced and the writ issued on June 22, 1916, and the return made by the sheriff on the writ states that on June 26th he took the bay horse out of the possession of the defendant, Fred Wulfert, but, upon the execution of a delivery bond as provided by section 2640, Revised Statutes 1909, he returned the horse to

him; that on June 27th he took the mare out of the possession of the defendant, Dietrich Wulfert, but, upon the execution by him of a similar bond, he returned said animal to said defendant.

The defendant, Dietrich Wulfert, filed a separate answer consisting of a general denial and asserting that at the commencement of the suit he owned the mare exclusively and had no interest in the horse, that the property of himself and his co-defendant were separate and there was no community of interest between them in the property sued for and that on that account the two defendants had been improperly joined in the suit. The defendant, Fred Wulfert, filed a similar answer claiming exclusive ownership in the horse but none in the mare.

The reply filed by the plaintiff denied specifically that Dietrich Wulfert was the owner of the mare and also denied that Fred Wulfert was the owner of the horse. Neither the answers nor the reply said anything about possession of the animals or of either of them.

A trial was had and the jury returned a verdict that "the plaintiff is entitled to one bay horse, nine years old, mentioned in the petition, also one *sorrel* mare, six years old, as mentioned in the petition." Upon this verdict the court rendered judgment that the plaintiff have and recover of and from the defendants the said horses and further adjudged that the plaintiff recover costs of the defendants and that execution issue therefor. Defendants thereupon appealed.

It is urged that plaintiff is not entitled to maintain the suit since no demand was made of defendants prior to the institution of the suit. But in this case no demand was necessary. The evidence is that after the condition of the mortgage had been broken, and the plaintiff had been authorized to take charge of the property, the defendant Dietrich Wulfert took the property in question away from where the mortgagor kept it. In other words, he took the property, wrongfully and without consent, out of what, at that time, was the possession of the mortgagee. In such case no demand was necessary to entitle plaintiff to main-

tain suit. [Harding v. Kelso, 91 Mo. App. 607; Burnham Hanna Munger & Co. v. Elmore, 66 Mo. App. 617; Moore v. Simms, 47 Mo. App. 182.] The evidence tended to show that up to the time defendant Dietrich Wulfert took the property away he never claimed to be the owner thereof but that he was merely a creditor of the mortgagor and never asserted ownership until after the latter had left the country. Nor did his co-defendant Fred Wulfert, make any claim of ownership prior to that time.

The petition is sufficient and the admission of the chattel mortgage in evidence was proper. [34 Cyc. 1497; First National Bank v. Ragsdale, 158 Mo. 668, 681.] Nor do the credits appearing on the back of the note secured by the mortgage show that the debt was paid. On the contrary, they show that it was not. Nor was the mortgage invalid for indefinite or insufficient description of the property. There was no doubt but that the animals were those mortgaged and no difficulty was experienced in identifying them. We do not agree with the contention that they were not proven to be the animals described in the mortgage. Nor can it be said that the defendants conclusively established their ownership of the animal each claimed. Mere proof that at a time prior to the execution of the mortgage each had purchased and secured title to the respective animal claimed by him did not invalidate the mortgagee's interest in view of the mortgagor's possession and indicia of ownership of the animals at the time the mortgage was given; and in view of the other evidence that the mortgagor owned them and that defendants made no claim of ownership until after the mortgagor's departure and for a time thereafter at least one of the defendants, Dietrich Wulfert, assumed to be only a creditor of the mortgagor and did not claim to be anything else till he learned that all of Julius' property was mortgaged and that the unsecured creditors "couldn't get anything."

It is insisted that the case should be reversed outright because there was a misjoinder of parties since the sheriff's return shows that he took the horse out of the possession of one defendant and the mare out of the

possession of the other defendant, and, in their answers, each disclaimed any interest in the animal claimed by the other. The judgment was for plaintiff and against both defendants for the possession of both horses and for costs. A joint judgment in replevin can be rendered only against parties shown to have a community of interest in the property in question or to have both been concerned in the taking or detention. [Cobbey on Replevin (2 Ed.) , sec. 1142.] It will be observed, however, that in defendants' plea of misjoinder in their answer they did not base the same upon any claim as to who took the property or upon a separate possession of the animals at the time of the commencement of the suit and the issuance and service of the writ. In fact, the only thing mentioned to show misjoinder was a lack of community *interest or title* in the property. In their testimony given as witnesses in their own behalf, *both* defendants admitted that, at the commencement of the suit and the issuance of the writ and at the time the sheriff came out to execute it, *both horses were in the possession of the defendant Dietrich Wulfert*. Consequently, plaintiff was entitled to maintain replevin as to both horses had the suit been brought against him alone. At most all that plaintiff did was to include Fred Wulfert in the suit when he need not have been made a defendant. And the only question is as to whether the case should be reversed as to him. But this defendant did not claim a misjoinder because of a diverse possession of the property but only because of *separate ownership*. And as he sought to defeat plaintiff's right to possession *solely* by claiming that the title to one of the horses was in him instead of the mortgagor at the time the mortgage was given, and made no claim that he should not have been sued because he was not in possession and was not concerned in the taking or withholding of the property, we do not think he is entitled to have the case reversed as to him. He made no claim that the taking of the property by his father was not also his act nor that the possession of the former was not also his possession; nor did he make any claim that in obtaining possession of the horse from his father, *subsequent* to the commencement of the suit and the issuance of the

writ, he did so innocently and without knowledge of the mortgagee's rights. Indeed, as the mortgage was recorded, he had at least constructive if not actual knowledge of it. The evidence, together with the course pursued by each of the defendants, shows that the property was wrongfully taken by and was in the possession of defendant Dietrich Wulfert and that if the defendant Fred Wulfert did not participate therein he did join in withholding the property, and, in effect, made what his father did his own act the same as if he had gone with him and helped to take the animals. And there was no claim or showing to the contrary. While it is true the sheriff's return shows that he took the horse out of the possession of one defendant and the mare out of the possession of the other, yet this is not conclusive in view of the solemn admissions of both defendants to the contrary. [Clark v. Sublette, 117 Mo. App. 519, 522.] Especially is this case where both horses were on the farm whereon both defendants had their home, so that the sheriff's statement that he took one of the animals out of the possession of Fred Wulfert was no more than a recognition of said defendant's claim of ownership, there being nothing in the location of the horses to outwardly disclose individual possession other than the claim of individual ownership.

It is urged that the judgment is not one that is authorized by the statute. It is true it is not in the form prescribed by section 2650 Revised Statutes 1909. It merely establishes the right of plaintiff to recover possession of the animals. Ordinarily a judgment for plaintiff in replevin, based upon a verdict which assesses the value of the property taken and damages for its detention, should recite those facts and give the plaintiff the right to choose the property or its assessed value. But the verdict in this case did not assess any damages or value. And the plaintiff is not asking for anything but the animals. The defendants lose nothing because the verdict and judgment went no further than to adjudge their return which can be done since the animals are in defendants' possession. The defendants are not injured and hence they cannot complain. [Stroud v.

Morton, 70 Mo. App. 647, 651; Caldwell v. Ryan, 210 Mo. 17.] The judgment is good as far as it goes. It is the animals themselves that the plaintiff seeks to recover and, since plaintiff prevailed, the defendants who lost the case cannot complain because the plaintiff did not obtain all that it was legally entitled to.

Finally, it is urged that the case should be reversed because the instructions and verdict called for a *sorrel* instead of a *bay* mare six years old. It will be observed that the verdict read "one sorrel mare six years old *as mentioned in the petition.*" There was only one mare six years old mentioned in the petition and no sorrel animal was mentioned anywhere either in the petition or evidence. Hence the use of the word "sorrel" was a mere clerical error which could in no wise affect the substantial rights of the parties, and the judgment should not be reversed or affected by reason thereof. [Sections 1850 and 2082, Revised Statutes 1909.]

We regret that necessity compels us to say that the briefs on both sides of this case are not such as the ability and usual industry of counsel would justify us in expecting to receive from them. Appellant's brief was so arranged as that it came perilously near being amenable to the motion aimed against it by respondent. In addition to this, citations in support of particular points referred us to whole *chapters* of certain works. These chapters were subdivided into sections which could have easily been cited and thus saved us the time and labor of searching through many pages to find what was referred to. We were also cited to sections in other works which were not contained in the volumes referred to. The defects in respondent's brief consisted of errors in giving the volume or page of the citations relied upon. A careful proof reading of the briefs *as to the citations* as well as the other parts of the brief would obviate such errors and save us much time and trouble. The transposition of figures, such as citing Vol. 194 when 149 is meant is not only an annoyance, it is a positive hindrance to us in our work.

It may be well to also state before closing, that since the perfection of the appeal herein, and before

submission of the case the defendant, Fred Wulfert, died, but, by agreement of all parties, the cause was revived against his administrator, B. F. Schuetz, and he was duly made a party hereto.

Finding no reversible error in the case the judgment is affirmed. All concur.

EDLA J. PITMAN, Plaintiff in Error, v. A. T. WEST,
et al., Defendant in Error.

Kansas City Court of Appeals, December 31, 1917.

1. **ATTACHMENT: Nonresidence: Bond: Appearance.** Where a defendant is a nonresident an attachment may issue without bond; but if he will enter his appearance and answer, the attachment will be dissolved, *if he so requests*.
2. ———: **Contesting Creditors: Superiority of Lien.** P sued W (a nonresident) by attachment and did not give bond. W answered and entered his appearance and asked that the attachment be dissolved. No action was taken by the court on the request at the time, but about six months thereafter P filed an attachment bond with the clerk and sought to revive or continue the attachment. In the meantime C sued out an attachment against W, gave bond, and had it levied on same land. It was *held* that even if P's attachment could be revived, it would not relate back to the original attachment and thus cut out C's attachment and that C had the prior and superior lien. It was also *held* that when W entered his appearance and answered to P's action and requested that the attachment be dissolved, it became the duty of the court to dissolve it, and such action by W practically did dissolve it so far as to permit C's attachment to become the superior lien.
3. ———: **Appearance: Dissolution.** Where a nonresident defendant is sued by attachment without an attachment bond and the defendant enters his appearance, answers and asks that the attachment be dissolved, though the court does not formally order its dissolution and the cause is continued, yet, if in the meantime another attachment suit is brought by another party and a bond given, it will be adjudged the superior lien.

Error to Atchison Circuit Court.—*Hon. L. D. Ramsey,*
Judge.

AFFIRMED.

Ernest Ross, W. M. Jackson, and Vinton Pike for plaintiff in error.

Broaddus & Crow for defendants in error.

ELLISON, P. J.—Edla J. Pitman and the Conway Savings Bank were separate attaching creditors of A. T. West who resided in Iowa, and this proceeding witnesses a contest between them for priority. The matter was finally heard by Hon. GEORGE W. WANAMAKER, Special Judge, and judgment rendered that the bank have priority. Pitman then sued out a writ of error from this court. No exceptions were preserved and we must dispose of the case on the record proper.

Pitman brought his action in the circuit court of Atchison county, Missouri, on the 19th of April, 1915, against West, who was a physician, for malpractice, claiming ten thousand dollars damages. He sued out an attachment on the same day on the ground that West was a nonresident, but did not give bond, and the writ was levied upon certain land in Atchison county on the 24th of April, 1915. On the 8th of the following July, West entered his appearance and filed his answer in vacation consisting of a general denial, and an admission that he was a nonresident of this State, and an allegation that at the time of filing the suit, plaintiff had not given bond, "and therefore asking that the attachment be dissolved and the suit be dismissed."

On the 31st of December thereafter, in vacation, Pitman filed an attachment bond in the cause which was approved by the clerk. The proceedings were in this situation when a term of court opened in the month of January, 1916, with a special Judge presiding, the regular Judge being absent, when, on the 8th of January, the cause came up and was submitted for trial. West was not present, but having appeared to the cause, and the plaintiff waiving a jury, the court heard the evidence and rendered a general judgment for plaintiff for \$10,000, but the attachment was not passed on, on account of the

special Judge being counsel for the other creditor claiming priority, and the question of sustaining Pitman's attachment was continued to the following term.

In three days after this judgment was rendered Pitman sued out a general execution thereunder and the sheriff levied generally upon the land and advertised it for sale at the following March term, 1916.

At that March term, held by another special Judge, Pitman filed his motion for judgment sustaining his attachment against the land and that it be made a special lien on the attached land, which, as we have said, had been levied on generally by the sheriff and was to be sold at that term.

The Conway Savings Bank began an attachment suit against West on the 30th of June, 1915, being more than two months subsequent to Pitman's suit. At the time of filing its petition the bank filed an affidavit alleging West's nonresidence and also gave an attachment bond. Its writ of attachment was levied on the same land levied upon by Pitman's execution. It thereafter obtained judgment sustaining its attachment and for its claim, and on the 20th of January, 1916, had a special execution levied upon the land aforesaid by the sheriff, who advertised it for sale on the 8th of March, 1916, at the March term; he, the sheriff, in this way had Pitman's general execution and the bank's special execution, both levied on the land and a sale under each advertised for the 8th of March. The land was sold under the bank's special execution for the sum of \$3500, which is the sum involved in the controversy.

At the March term, to which the matter of his attachment had been continued, Pitman filed his motion for a judgment sustaining his attachment and that it be made a special lien upon the property attached. Thereupon the bank filed its motion reciting the matters above set forth, concluding with the following:

"Wherefore the relator (the bank) moves this court to dissolve the attachment in the above entitled cause, and to postpone the lien of the judgment of said Elda J. Pitman to the special lien of attachment of your relator, and for reasons of said motion, states: That

the filing of the answer on July 8, 1915, by operation of law, dissolved the attachment of the plaintiff in the above entitled cause. That there is no authority for filing an attachment bond with the clerk of this court in vacation, after the attachment writ had issued, and such bond is a nullity, and would not revive a lien in favor of plaintiff and even if it had been filed in open court by permission of the Judge, if it created any lien it could only date from December 31, 1915."

Pitman's and the bank's motions were submitted together and the court granted Pitman's motion sustaining his attachment, but postponed the lien thereof to the lien of the bank's attachment. Pitman, as stated at the outset, then sued out a writ of error from this court.

It is provided by section 2298, Revised Statutes, 1909, that an action by attachment may be brought against a nonresident defendant without giving a bond; but when West filed his answer and entered his appearance to Pitman's action, accompanied by his prayer that the attachment be dissolved, he became entitled, under the proviso to that statute, to have it dissolved. It is ruled by the Supreme Court, in an opinion by Judge BLAIR, that filing an answer and entering appearance alone will not, *ipso facto*, dissolve the attachment, and to have that effect it should be accompanied by a request or application from the defendant and an order of court. [Donovan v. Gibbs, 268 Mo. 279.] So it is said by Pitman that as the court did not in fact order the attachment dissolved, he could keep it alive in the face of defendant's appearance, by filing a bond, and that he did file a bond. But, as we have said, he did not do so for near six months thereafter when he filed one with the clerk in vacation. Conceding he could so file a bond at that time with the clerk (but not deciding he could) the bank had in the meantime, to-wit the 30th of June, 1915, brought its action and had its attachment levied. In the circumstances we think this had the effect of putting the lien of its attachment ahead of Pitman's which, practically, came into existence (if it did at all) long

afterwards. We say that it practically did not come into existence until after the bank had sued out and levied its attachment, from the fact that by reason of West having entered his appearance and requested that the attachment be dissolved it became the duty of the court "as of course" to dissolve the attachment. The statutory expression, "as of course," meaning when asked by the defendant; and as defendant had complied with every requisite to a dissolution of the attachment, it had the effect of freeing his property so far as to let in a subsequent attaching creditor who had his attachment levied before the prior attaching creditor had taken steps to secure an attachment by giving a bond.

But it is suggested in Pitman's behalf that the court was not authorized by section 2343 Revised Statutes 1909, to adjudge priority to the bank's attachment. That statute reads:

"Where the same property is attached in several actions by different plaintiffs, against the same defendant, the court may settle and determine all controversies which may arise between any of the plaintiffs in relation to the property, and the priority, good faith, force and effect of the different attachments, and may dissolve any attachment, partially or wholly, or postpone it to another, or make such order in the premises as right and justice may require"

It is said that if Pitman's judgment was merely a general one upon which a general execution was issued, it did not present a case of conflicting attachments. That might be true in law under the actual facts, but, as has been already stated, Pitman sued out an attachment when he filed his petition, and the record in the trial court, as well as this court, shows that he has persisted in his claim that that attachment was superior to the bank's. In the former court, by subsequently filing an attachment bond and endeavoring by motion to maintain his attachment as superior to the bank's by having it sustained as a special lien, and by actually having it sustained, though the court postponed the lien thereof to the lien of the bank; and in this court he has insisted that West did not take any affirm-

ative step at the time of, or after, entering his appearance toward having his (Pitman's) attachment dissolved, it therefore remained alive, (a point we have ruled against him) and the bank had no attachment prior to or superior to his. And on this last suggestion he has cited *Stephenson v. Parker Stationery Co.*, 142 Mo. 13, as authority. That case supports the statute above quoted and is therefore against him. The decision therein was based on a controversy not as to priority of attachments or liens, but a controversy that arose between different creditors growing out of the *manner of the creditor of their respective debts* on which their attachments were based; and the court held that the statute did not authorize that character of contest.

The foregoing considerations lead us to an affirmance of the judgment. All concur.

DENNIS ANDERSON, Respondent, v. MISSOURI
BENEFIT ASSOCIATION, Appellant.

Kansas City Court of Appeals, December 31, 1917.

1. **INSURANCE, LIFE: Assessment Companies: Suicide: Foreign and Domestic.** Domestic and foreign assessment life insurance companies are subject alike to section 6945, R. S. 1909, providing that suicide shall not be a defense to an action on a policy written by such companies.
2. —: **Suicide: Assessment Companies.** A domestic assessment life insurance company issued a policy upon the life of one George Anderson in favor of plaintiff for \$100. The policy provided that if the insured committed suicide the beneficiary should receive only fifty dollars. Anderson committed suicide by shooting himself. The company refused to pay the full amount, claiming that section 6945, R. S. 1909 (the suicide statute) did not apply to domestic assessment companies. It was *held* that a proper interpretation of section 6959, R. S. 1909, makes both foreign and domestic assessment insurance companies subject alike to section 6945 which provides that suicide shall be no defense and that therefore the plaintiff was entitled to recover the sum of \$100.

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Anderson v. Mo. Benefit Ass'n.

Appeal from Platte Circuit Court.—*Hon. Alonzo D. Burns*, Judge.

AFFIRMED.

James H. Hull and *Martin E. Lawson* for appellant.

Guy B. Park for respondent.

BLAND, J.—This is a suit on an insurance policy in the sum of one hundred (\$100) dollars, issued by defendant on April 6, 1910, insuring the life of George Anderson in favor of plaintiff. The policy provided that if the insured committed suicide the amount that was to be paid to his beneficiary was fifty (\$50) dollars. On January 20, 1910, the insured committed suicide by shooting himself.

Defendant claims that as it is a domestic assessment company it is not bound by a provision of the general insurance laws providing that suicide shall not be a defense in an action upon a life insurance policy. [Section 6945, R. S. 1909] Prior to 1897 (see Session Acts of 1897, page 130), no assessment company, either foreign or domestic, was bound by section 6945, Revised Statutes 1909, prohibiting the defense of suicide to life insurance companies. [Haynie v. The Knight Templars and Masons' Indemnity Company, 139 Mo. 416; Wallace v. Bankers' Life Association, 80 Mo. App. 102; Aloe v. Fidelity Mutual Life Association, 164 Mo. 675; Elliott v. Des Moines Life Association, 163 Mo. 132.]

By an act approved March 15, 1897, section 5869, Revised Statutes 1889, now section 6959, Revised Statutes 1909, was amended (see Session Laws of 1897, page 130). Under this section, as it stood before the Amendment of 1897, the character of insurance companies mentioned in the second half of said section was made subject only to the provisions of section 5912, Revised Statutes 1889, now section 7042, Revised Statutes 1909 (providing for service on foreign companies). By said Act

of 1897 the Legislature extended the provisions of the section that required such insurance companies to conform to section 5912, Revised Statutes 1889, by enacting that such companies in addition to being subject to the last-mentioned section should also be subject to sections of the general insurance statute which now are sections 6945 (the suicide statute), 6937 (the misrepresentation statute), and 6940 (requiring a deposit of premiums paid before a defense on the ground of misrepresentation can be made), Revised Statutes 1909.

It is, however, the contention of defendant that section 6959, Revised Statutes 1909, makes only foreign assessment insurance companies subject to section 6945, Revised Statutes 1909, and that the law has never been changed exempting domestic insurance companies from the provision of such section.

Why the Legislature would desire to make such a discrimination between domestic and foreign insurance companies is beyond any explanation. We know of no reason why the Legislature should apply the burden of the suicide clause to foreign companies and exempt domestic companies from the same. Such would be a discrimination which cannot be supposed in the absence of clear expression on the part of the Legislature to the contrary. [See *Goodson v. National Masonic Accident Association*, 91 Mo. App. 350.]

Ever since the Amendment of 1897, or for more than twenty years, the bench and bar of this State have accepted section 6959, Revised Statutes 1909, in its reference to sections 6945, 7042, 6937 and 6940 of the general insurance laws, as covering both foreign and domestic insurance companies. [See *Collins v. Mut. Life Association*, 84 Mo. App. 1. c. 556; *Logan v. Fidelity and Casualty Co.*, 146 Mo. 1. c. 123; *Toomey v. Supreme Lodge*, 147 Mo. 1. c. 137; *Elliott v. Ins. Co.*, 163 Mo. 1. c. 157.]

That part of section 6959, Revised Statutes 1909, pertinent to this case provides “. . . all such foreign companies are hereby declared to be subject to,

and required to conform to the provisions of sections 6945, 7042, 6937 and 6940, Revised Statutes 1909, and governed and controlled by all the provisions in said sections contained; *provided always*, that nothing herein contained shall subject *any corporation doing business under this article* to any other provisions or requirements of the general insurance laws of this State, *except as distinctly herein set forth and provided.*" (Italics ours.)

Section 6959, Revised Statutes 1909, were it not for the proviso therein, might be construed as making only foreign insurance companies subject to section 6945 of the statute (being the suicide section of the general insurance laws), but in view of what we have already said in reference to the rules of construction appertaining to this statute we must construe the proviso of section 6959, Revised Statutes 1909, to mean that no corporation doing business under that article (foreign or domestic) shall be subject to any other provisions or requirements of the general insurance laws of this State, except as to the provisions and requirements of article 3 chapter 61, Revised Statutes 1909, which includes sections 6945, 7042, 6937 and 6940.

As before stated, prior to the Act of 1897, *supra*, the character of insurance companies mentioned in that part of section 6959, Revised Statutes 1909, quoted above was made subject to section 5912, Revised Statutes 1889 now section 7042, Revised Statutes 1909, only, or that section of the general insurance laws that provides for service on foreign insurance companies. In order to emphasize and make clear the fact that domestic insurance companies were not to be subject to section 5912, Revised Statutes 1889, now section 7042, Revised Statutes 1909, the words "foreign companies" were used in section 5869, Revised Statutes 1889 now section 6959, Revised Statutes 1909. Evidently the Legislature in retaining said words in the Amendment of 1897 meant to continue the emphasis mentioned, but by retaining the proviso it was intended that those sections of the General Statutes mentioned in article 3, chapter 61, Re-

Meyer v. Nischwitz.

vised Statute 1909 as amended (Laws of 1897, page 130), applicable to domestic companies, should be applied to them.

We are, therefore, of the opinion that a proper interpretation of section 6959 makes both foreign and domestic assessment insurance companies subject alike to section 6945 of the statutes providing that suicide shall not be a defense.

Suicide not being a defense in this case plaintiff was entitled to recover the sum of one hundred (\$100) dollars and was not bound by that provision of the policy limiting the amount of the insurance to only fifty (\$50) dollars in case of suicide. [Applegate v. Travelers Ins. Co., 153 Mo. App. 63; Harms v. Fidelity and Casualty Co., 172 Mo. App. 241; Dodt v. Ins. Co., 186 Mo. App. 1. c. 176.]

The judgment is affirmed. All concur.

MARTIN T. MEYER, Administrator of the Estate of
JOHN H. AS AHL, deceased, Respondent, v. **E. C.**
NISCHWITZ, Executor of the Last Will of **ANNA**
MARGARET AS AHL, deceased, Appellant.

Kansas City Court of Appeals, December 31, 1917.

1. **EQUITY: Administration of Estates: Jurisdiction of Circuit Courts.** A widow, the sole devisee and legatee, upon the death of her husband, took possession of his property, without the aid of administration, and for five years mingled the same with her own property and for six years more her executor continued such intermingling. During that time the widow and her administrator changed the property so commingled into various other forms of notes and certificates of deposit than those left at the death of the husband, so that it became almost impossible to separate it. In another proceeding an adopted daughter, not mentioned in the will, was adjudicated a pretermitted heir. The plaintiff was duly appointed administrator of the husband's estate and brought this action for an accounting. It was held that the facts and circumstances were so complicated and the questions involved so difficult, intricate and abstruse that only a court of equity had the power necessary to adjust and settle them.

2. ———: **Necessity for Administration: Probate Courts.** Where there are two or more heirs to an estate, one of whom appropriates the entire estate to his own use, the others may, upon application to the probate court, have an administrator appointed who will have power to take charge of the property of the estate and distribute it among the heirs, notwithstanding there may be no debts, and the order of the probate court appointing such administrator cannot be collaterally attacked.
3. ———: **Res Adjudicata: Plea of.** A plea of *res adjudicata* will not avail where the parties to the action are not the same, as in a case where one action is brought against a party as an individual and another as the executor of an estate.
4. ———: **Statute of Limitations.** The Statute of Limitations does not begin to run against an action for conversion of a deceased's personal property until the appointment of an administrator of his estate and until such time as the latter may maintain an action for its conversion. In this case the administrator of the estate of the deceased could not have maintained this suit until after the date upon which the adopted daughter was adjudged a pretermitted heir, and in view of this fact, the Statute of Limitations began to run from the latter date.

Appeal from Moniteau Circuit Court.—*Hon. Jack G. Slate*, Judge.

AFFIRMED.

Embry & Embry and *S. C. Gill* for appellant.

L. F. Wood for respondent.

BLAND, J.—In the month of December, 1906, John H. Asahl died testate in California, Missouri, leaving his widow, Anna Margaret Asahl, his sole devisee and legatee. However he had an adopted daughter who was not mentioned in the will and this court in the case of *Buck v. Meyer*, 195 Mo. App. 287, on December 18, 1916, declared said daughter to be a pretermitted heir. The effect of this decision was that said daughter was entitled to one-half of the personal estate regardless of the will. There was no administration on the estate of John H. Asahl at his death, but the widow took charge of the property, both real and personal, and treated the same as her own.

In the month of April, 1911, the widow died leaving a will appointing E. C. Nischwitz, appellant herein, as executor of her estate. The latter qualified and took charge of her estate as executor.

On April 27, 1911, after the death of Anna Margaret Asahl, Martin T. Meyer, the plaintiff herein, was appointed administrator of the estate of John H. Asahl, deceased. On March 29, 1917, plaintiff brought this suit and in his petition alleged that at the time of the death of John H. Asahl the said Anna Margaret Asahl took possession of the entire estate of the said John H. Asahl, deceased, and intermingled the same with her own property; that upon the death of the said Anna Margaret Asahl the defendant as her executor took possession of said property of John H. Asahl, deceased, intermingled with that of the individual property of the said Anna Margaret Asahl, deceased; that the mingled property consisted of notes and various certificates of deposit in the California State Bank, aggregating the sum of seventy-nine hundred, forty-four and 20/100 (\$7944.20) dollars; and prayed for an accounting of the property belonging to the said John H. Asahl, deceased, together with accumulations thereof and interest thereon. The answer pleaded as a bar to the action that the probate court had exclusive jurisdiction of the controversy; that there was a similar suit pending undisposed of between the parties in the probate court; that the matter had been adjudicated in a case arising in the probate court of Moniteau County, Missouri, appealed to the circuit court of said county and again appealed to the Kansas City Court of Appeals (*Meyer v. Nischwitz*, 177 S. W. 794), and, in addition, pleaded the Statute of Limitations. On trial before the court plaintiff recovered and defendant has appealed.

Defendant's first point is that the probate court of Moniteau county has exclusive original jurisdiction to hear and determine this cause in that a full remedy is given plaintiff through the processes of the probate court under sections 70-71-72-73, and 74, Revised Statutes 1909. In the case of *Hook v. Dyer*, 47 Mo. 214, the supreme court

had under consideration a case very similar to this one, and under the facts in that case the court held that the statute referred to by defendant in this case did not provide a proper method of investigating the subject, in that the wife in that case had so mingled the property of her deceased's husband with that of her own that it could not be easily separated, and that the statute under consideration did not furnish the best opportunity for investigating so complicated a matter. Claims of this nature frequently involve the most difficult, intricate and abstruse questions and require all the powers and machinery of a court of equity to adjust and settle upon an equitable basis. The probate court would have no jurisdiction to inquire into such controversies. [See *Brewing Co. v. Steckman*, 180 Mo. App. 1. c. 326.]

In the case at bar the wife, the widow of the deceased, had taken possession of the property of her husband, without the aid of administration, and for nearly five years mingling the same with her own. Such intermingling had been continued by her executor for six years more. The commingling had thus been going on for nearly eleven years by the widow and her administrator, changing the property so commingled into various other forms of notes and certificates of deposit than those left at the death of John H. Asahl that at the time of the trial it became almost an impossibility to separate the property of John H. Asahl, deceased, from that of the widow. Following the decision of the supreme court in the case of *Hook v. Dyer*, *supra*, we believe the facts of this case make it one of such complication as to confer jurisdiction on the circuit court and that the probate court had no jurisdiction.

Defendant next contends that as John H. Asahl, deceased, left no debts, there was no necessity for the appointment of plaintiff as administrator of his estate, in that defendant says that Anna Margaret Asahl was the sole distributee of the estate of John H. Asahl, deceased, therefore it would be requiring the doing of a useless and unnecessary thing to force such a distributee to turn over the property to such an administrator; that a

court of equity will not enforce the administrator's naked title in order that he may uselessly override the distributee's equitable title, and cites in support of these contentions the case of *Richardson v. Cole*, 160 Mo. 372, and similar cases.

In the case cited the public administrator, nearly twelve years after the death of the owner of the personal property, attempted to take charge of the property that had been voluntarily and without the aid of administration, shortly after the death of the deceased, distributed among the next of kin. The Supreme Court in that case held that the administrator could not take possession of the property under such circumstances.

This case, however, is not one where there is but one heir, or where there is more than one and all agree to the distribution of the estate without the aid of administration. Rather it is a case where there are two heirs, one of whom is appropriating the entire estate to her own use to the exclusion of the other. Under such facts defendant's point is not well taken. Under the circumstances in this case appellant is attempting to collaterally attack the judgment of the probate court directing plaintiff to take charge of the estate of deceased, which defendant cannot effectually do. [See *Richardson v. Cole*, supra.]

The next point raised by defendant is that his plea of *res judicata* should have been sustained by the court, in that there was a judgment adjudicating this claim against plaintiff in the case of *Meyer v. Nischwitz*, supra. In that case Nischwitz was sued personally and not as the executor of the estate of Anna Margaret Asahl, deceased. In this case he is sued in his capacity as executor and not in his individual capacity. In the case at bar the parties are different from those in the case of *Meyer v. Nischwitz*, supra, and therefore that case did not adjudicate the matter now in dispute between the parties. [State v. Branch, 134 Mo. 592.]

Defendant's next point is that the judgment is excessive. The judgment was for twenty-six hundred and sixty-nine (\$2669.) dollars, on account of money de-

posited in the bank and other personal property owned by John H. Asahl that was mingled with the property of Anna Margaret Asahl, and for fifty-four and 4/100 (\$54.04) dollars on account of net returns from John H. Asahl's real estate, collected by the executor of the estate of Anna Margaret Asahl, deceased, and coming to plaintiff. The evidence was ample to support the finding of this judgment. This evidence showed that John H. Asahl at the time of his death had notes on hand and certificates of deposit in the Farmers and Traders Bank in California, Missouri, aggregating said sum of money. In addition to this there is no evidence that Anna Margaret Asahl ever had more than twelve hundred (\$1200) dollars of her own money before her marriage to John H. Asahl, and there is no evidence she ever received any other money of any kind from any other source at any time. At her death an inventory of her estate showed that she had personal property in the form of certificates of deposit and notes to the amount of seventy-nine hundred, forty-four and 20/100 (\$7944.20) dollars. The court apparently placed the burden upon plaintiff to show the exact property mingled, and in view of this burden so placed on plaintiff the evidence amply justified the court in finding for plaintiff in the sum of money mentioned.

The last point made by defendant is that this suit is barred by the Statute of Limitations. In this connection defendant's contention is that as John H. Asahl died in December, 1906, and this suit was not begun until March 29, 1917, more than ten years had elapsed since Anna Margaret Asahl converted the property. This contention cannot be well taken for the reason that there was no one in existence who was authorized to sue for the conversion of the personal property of John H. Asahl, deceased, until the appointment of plaintiff as administrator of his estate, which, as we have already stated, occurred on the 27th day of April, 1911. The Statute of Limitations did not begin to run until this appointment.

[McDonald v. Walton, 1 Mo. 727; White v. Blankenbecker, 115 Mo. App. 722.] But defendant says that plaintiff had only five years within which to bring this suit after his appointment. The decision of this court in the case of Buck v. Meyer, *supra*, was not rendered until December 18, 1916. The case was brought in the court below on July 12, 1912. Until July 18, 1916, Anna C. Buck had not been declared the pretermitted heir of John H. Asahl, deceased, and no suit brought by this administrator prior to that time could have been successfully prosecuted for the reason that prior to December 18, 1916, Anna Margaret Asahl appeared to be the only heir of John H. Asahl, deceased, and apparently administration was not necessary. As she had taken possession of the property without the intervention of an administrator, under the decision of Richardson v. Cole, *supra*, this plaintiff prior to said date would have been denied the right to recover. For these reasons we believe that the Statute of Limitations did not begin to run against the suit at bar until the decision of this court on December 18, 1916, declaring Anna C. Buck the pretermitted heir of John H. Asahl, deceased.

The judgment will be affirmed. All concur.

FONTAINE McCULLAM, TRUSTEE IN BANKRUPTCY OF MASTERS LUMBER COMPANY,
Respondent, v. BUCKINGHAM HOTEL COMPANY, Appellant.

St. Louis Court of Appeals, Opinion Filed December 4, 1917.

1. **CORPORATIONS: Officers: Misapplication of Corporate Funds.** One accepting corporate checks, drawn by an officer thereof, in payment of his private obligations, takes the risk of being required to restore the proceeds thereof, in the event that corporate funds were thereby misapplied.
2. **——: Misapplication of Corporate Funds: Evidence: Burden of Proof.** A defendant admitting that he received corporate checks drawn by an officer in payment of private obligations has the

McCullam v. Buckingham Hotel Co.

burden of showing such officer's authority to draw upon corporate funds for private purposes.

3. ———: ———: **Statute: Retroactive Operation.** Laws 1917, p. 143, rendering not liable persons receiving in good faith corporate checks for private obligations of officers, is inapplicable where judgment was entered against defendant payee in 1916.
4. ———: **Officers: Increase in Compensation.** A president of a corporation cannot arbitrarily increase his salary and credit himself with such increase for the preceding year without consent of the directors or stockholders.
5. **BANKRUPTCY: Suits by Trustee in Bankruptcy: Estoppel.** A bankruptcy trustee is not estopped from recovering corporate funds diverted to paying private debts of officers by the alleged consent of the directors and stockholders, since the trustee also represents corporate creditors.
6. **CORPORATIONS: Officers: Misapplication of Corporate Funds.** The amount of monthly corporate checks drawn by an officer for his private debts may be recovered, where such officer had previously overdrawn his salary account, although such checks were for smaller amounts than the officer's monthly salary.
7. **BANKRUPTCY: Misapplication of Corporate Funds: Suit by Trustee in Bankruptcy.** A bankruptcy trustee may recover corporate funds diverted by an officer for paying his private debts while the corporation was insolvent, although many creditor's claims represented by the trustee accrued subsequent to such diversion.
8. **CORPORATIONS: Officers: Misapplication of Corporate Funds.** Corporate checks drawn by an officer for his private obligations carry upon their face notice of their irregular and illegal character.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. Leo S. Rassieur*, Judge.

AFFIRMED.

Marshall & Henderson for appellant.

(1) Instruction No. 1 covers the facts in judgment, under the agreed statement of facts, and the trial court erred in refusing the same for the following reasons: (a) This is an action for money had and received, and is, therefore, equitable in its nature, and it would be inequitable to hold the defendant liable in this case. *Reynolds v. Gerderman*, 185 Mo. App. 183. (b) The de-

defendant has successfully borne the burden of showing that S. M. Masters and Marcus Masters had authority from the corporation to pay their individual debts to the defendant for board and lodging at the defendant's hotel. *St. Charles Savings Bank v. Edwards*, 234 Mo. 555; *Coleman v. Stocke*, 159 Mo. App. 43; *Clifford Banking Co. v. Donovan Com. Co.*, 195 Mo. 262; *St. Charles Savings Bank v. Orthwein Inv. Co.*, 160 Mo. App. 369. (c) S. M. Masters and Marcus Masters were entitled to salaries from the corporation, notwithstanding no resolution was ever adopted by the stockholders or directors fixing their salaries, and there was no entry of such a resolution upon the minutes of the meetings of the stockholders or directors fixing such salaries, because S. M. Masters, Marcus Masters and Louis C. Johnson were the sole stockholders and directors of the corporation and they fixed the salary each should receive, and that agreement is just as effectual and binding as if it had been entered upon such minutes. *Tausig v. Railroad Co.*, 166 Mo. 33; *Rose v. Carbonating Co.*, 60 Mo. App. 28; *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349; *Remmers v. Seky*, 70 Mo. App. 364; *Ward v. Davidson*, 89 Mo. 454. The only case which holds that there must be a resolution of the stockholders or board of directors regularly adopted and entered upon the minutes fixing the salaries of the officers, is the case of *Besch v. Western Carriage Co.*, 36 Mo. App. 333. (d) A corporation is a citizen within the meaning of the Fourteenth Amendment to the Constitution of the United States, and stands in the same relation to a subject-matter with a citizen, where the conditions are the same. *Turnpike Co. v. Sanford*, 164 U. S. 592; *Julian v. Star*, 209 Mo. 102; *Houston v. Pulitzer Pub. Co.*, 249 Mo. 338. (e) A citizen employer would be estopped to recover from a third person money paid to a third person by an agent in discharge of the agent's debts to such third person under the conditions here presented. So, a corporation is estopped under the same conditions. Hence, it was error to refuse defendant's instruction No. 5. (f) Only creditors whose claims

were existing at the date of a wrongful appropriation of the corporation's funds can be heard to recover the same. Subsequent creditors cannot do so, for they did not give credit to the corporation upon the faith of the corporation having such assets. *Reynolds v. Faust*, 179 Mo. 21. (2) Aside from all the foregoing considerations, the judgment of the trial court must be reversed, and judgment entered in this court for the defendant, because the General Assembly of Missouri has passed an act regulating the matters here involved, and changing the rule of law and the policy of the law in Missouri, which has the same effect as if this Court and the Supreme Court had overruled the prior decisions in this State establishing the policy of the law. Acts 1917, p. 143. Under this act and under the agreed statement of facts, that the defendant had no actual knowledge that the checks given to the defendant in the name of the corporation by its president were issued without authority of the corporation, there can be no recovery in this case. The General Assembly had power to pass this act and it applies to this case. 8 Cyc, p. 925; *Keene v. Wyatt*, 160 Mo. 13 and 16; *Hendricks v. Musgrove*, 183 Mo. 307; *Trust Co. v. Donnell*, 81 Mo. App. 151; *Insurance Co. v. Hill*, 86 Mo. 472; *State v. Jackson*, 105 Mo. 199; *State ex rel. v. Railroad*, 9 Mo. App. 532, affirmed 79 Mo. 420; *Leete v. Bank*, 115 Mo. 184; *Railroad v. Cadmore*, 103 Mo. 634; *Van Rheeder v. Bush*, 44 Mo. App. 283; *O'Brien v. Allen*, 108 Mo. 227; *Daggs v. Insurance Co.*, 136 Mo. 382; *State ex rel. v. Hager*, 91 Mo. 452; *Lovell v. Davis*, 52 Mo. App. 342; *Sheehan v. Insurance Co.*, 53 Mo. App. 354; *Coe v. Ritter*, 86 Mo. 277; *Zellers v. Surety Co.*, 210 Mo. 86; *Roefeldt v. Railroad*, 180 Mo. 554; 26 A. & E. Enc. Law (2 Ed.), 695.

Frumberg & Russell for respondent.

(1) Where a president or other officers of a corporation uses the checks of the corporation in payment of his private debts, the corporation, or its receiver or trustee in bankruptcy, is entitled to recover the amounts

thereof. *Kitchens v. Teasdale Com. Co.*, 105 Mo. App. 463; *St. Louis Charcoal Co. v. Lewis*, 154 Mo. App. 548; *Coleman v. Stocke*, 159 Mo. App. 43; *Bank v. Orthwein Com. Co.*, 160 Mo. App. 369; *Reynolds v. Gerdelman*, 185 Mo. App. 176; *Reynolds v. Title Guaranty Trust Co.*, 189 S. W. 176; *Clifford Banking Co. v. Donovan Com. Co.*, 195 Mo. 262; *Blake v. Bank*, 219 Mo. 644; *St. Charles Savings Bank v. Edwards Brokerage Co.*, 243 Mo. 553; *Reynolds v. Whittemore*, 190 S. W. 594. (2) The same rules of law apply to corporations as to individuals or partnership. *Ackley v. Staehlin*, 56 Mo. 558; *Flannagan v. Alexander*, 50 Mo. 50; *Price v. Hunt*, 59 Mo. 258; *Hilliker v. Francisco*, 65 Mo. 598; *Reyburn v. Mitchell*, 106 Mo. 365; *Goddard-Peck Grocer Co. v. McCune*, 122 Mo. 426; *Mansur-Tebbetts Imp. Co. v. Bruton*, 159 Mo. 213; *Blake v. Bank*, 219 Mo. 644. (3) Officers of a corporation are not entitled to salary for the performance of their ordinary duties as such officers unless they enter into a contract with the corporation for the payment of such salaries. *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349; *Besch v. Western Carriage Mfg. Co.* 36 Mo. App. 336; *Rose v. Carbonating Co.*, 60 Mo. App. 28; *Remmers v. Seky*, 70 Mo. App. 364; *Ward v. Davidson*, 89 Mo. 454; *Tausig v. Railroad Co.*, 166 Mo. 33. (4) The mere fact that the officers were entitled to a salary would not authorize them to use the funds of the corporation for their private purposes unless the corporation actually received consideration for the checks. *Bank v. Edwards*, 243 Mo. 553; *Reynolds v. Whittemore*, 190 S. W. 594. (5) The agreed statement of facts does not show the consent, with full knowledge, of all the stockholders to the misappropriations of the corporation funds, and the trustee is entitled to recover in right of the corporation. *Thompson on corporations* (1 Ed.), secs. 4014, 4049; *Brick Co. v. Schoeneich*, 65 Mo. App. 283; *Kitchens v. Teasdale Com. Co.*, 105 Mo. App. 463; *Bank v. Investment Co.*, 160 Mo. App. 369; *Pitts v. Steele Mercantile Company*. (6) The trustee in bankruptcy is entitled to recover as the representative of the creditors of the corporation.

Black on Bankruptcy, sec 392; Manufacturing Co. v. Carriage Co., 152 Mo. 401; National Tube Works Co. v. Machine Co., 118 Mo. 365; Coleman v. Stocke, 159 Mo. App. 43. (7) The jurisdiction of the court in this case is purely appellate, and it is confined to an examination of the record and the determination of the question as to whether or not error was committed by the trial judge in matters expressly decided by him. R. S. 1909, secs. 2081, 2082, 2083.

ALLEN, J.—This is an action prosecuted by the trustee in bankruptcy of the Masters Lumber Company, a corporation, to recover the proceeds of forty-nine checks executed in the name of that company, as maker, by S. M. Masters, its president, payable to the order of defendant corporation, which were received and cashed by defendant in payment to it of the individual indebtedness of S. M. Masters and of Marcus Masters, the secretary of the Masters Lumber Company. The petition is in forty-nine counts, and seeks a recovery of the separate amounts so received by defendant, as for money had and received; the total amount sought to be recovered, exclusive of interest, being \$5321.31.

The trial, upon an agreed statement of facts, before the court without a jury, a jury having been waived, resulted in a judgment for plaintiff in the sum of \$5830.30—being the aggregated amount claimed in the forty-nine counts of the petition, with interest—and the case is here on defendant's appeal.

A summary of the facts appearing in the agreed statement may be stated as follows:

The Masters Lumber Company was incorporated under the laws of this State on May 18, 1909, with a capital stock of \$10,000. At the outset there were but three stockholders who were the three directors. S. M. Masters and one Yewell Rice held all of the stock, with the exception of one share which was transferred to Rice soon after the date of the incorporation. Masters became president and Rice secretary. Later, in January, 1910, the two directors other than S. M. Masters were

replaced by Marcus S. Masters and one Corrington who were nominal stockholders only; and Marcus S. Masters became secretary. Later, on October 13, 1911, the capital stock was increased to \$18,000, and one Johnson acquired a stock interest and was chosen a director in lieu of Corrington who ceased to be a stockholder. Thereafter the board of directors consisted of S. M. Masters, Marcus S. Masters and Johnson.

It is recited that Rice "held various amounts of stock from the date of incorporation until October 13, 1911, and there appears in the stock certificate book two stubs showing that there was issued to him an aggregate of forty-nine shares of which there is no record of transfer or cancellation."

No resolution was ever adopted by the stockholders or directors of the company allowing any salaries to officers, but with the knowledge of all the stockholders and directors, and without objection on their part, S. M. Masters claimed and took credit for a salary of \$175 per month to and including the month of April, 1913. In May, 1913, without authority from any source, and without the knowledge of Johnson, S. M. Masters credited himself on the books of the company with \$1200 as "twelve months back salary;" and thereafter he credited his account monthly with the sum of \$275.

Marcus S. Masters, with the knowledge of the stockholders and directors, took credit for a salary ranging from \$90 to \$110 per month.

From December 1, 1909, until April 12, 1913, defendant furnished S. M. Masters and Marcus S. Masters board and lodging at the "Buckingham Club," a hotel operated by defendant; and beginning January 1, 1910, defendant was paid therefor monthly by checks of the Masters Lumber Company, accepted and cashed by defendant, drawn upon funds of the lumber company in bank, and executed by S. M. Masters as its president; each check being in a sum sufficient to cover the monthly bills for the board and lodging of both of the persons named. On April 12, 1913, S. M. Masters left defend-

ant's hotel, but Marcus S. Masters continued to lodge and board there until March 11, 1914; and during that period defendant was paid for such board and lodging monthly by like checks of the lumber company, executed by S. M. Masters as president, and which were accepted and cashed by defendant. It is the proceeds of these checks, forty-nine in all, that plaintiff trustee seeks to recover in this action.

At the time of the issuance of each of the above mentioned checks the Masters Lumber Company was not indebted to either S. M. Masters or Marcus S. Masters, but the account of each with the company was overdrawn, that of S. M. Masters being largely overdrawn. Crediting S. M. Masters with a salary of \$175 per month, his account appears to have been overdrawn \$1559.95 on January 1, 1910, when the first of these checks was received by defendant. During 1910 the overdraft increased to more than \$11,000, and it continued to increase until May 11, 1914, when it was \$24,743.73.

It appears that Johnson, then the only director of the Masters Lumber Company other than S. M. Masters and Marcus S. Masters, on several occasions saw checks of the company drawn by S. M. Masters payable to defendant, and knew that they were to be given in payment of the individual accounts of S. M. Masters and Marcus S. Masters, and made no objection thereto, believing it is said, that the checks were properly issued against credits for salaries. He did not know that the accounts of S. M. Masters and Marcus S. Masters were overdrawn, although he might have ascertained this by an examination of the company's books.

On January 1, 1910, the liabilities of the Masters Lumber Company to creditors, as shown by its books, were \$13,628.70 and its assets \$20,063.64. On July 31, 1910, the company's indebtedness exceeded its assets by more than \$2000; and the deficit steadily increased until bankruptcy intervened, in June, 1914, when the company's indebtedness, as shown by its books, amounted to \$48,442.22, while its principal assets, aside from claims

of the character of that in suit, consisted, it is said, of office furniture and fixtures.

It is recited in the agreed statement of facts that all of the accounts proved against the bankrupt estate were "opened or balanced not earlier than January 1, 1913," and that the last items of all of the accounts so proved were of date "not earlier than June 1, 1913," with the exception of eight accounts, two of which began in 1909, and the others in 1911 or 1912. These eight claims aggregated \$3856.04.

It is admitted that defendant had no notice or knowledge of the insolvency of the Masters Lumber Company or of the state of the accounts of S. M. Masters and Marcus S. Masters with it; and had no actual notice that the checks received by it were issued without authority.

From the agreed statement of facts it appears that the trustee had brought ten other suits of this character, against various individuals, firms or corporations, seeking, presumably, to recover the proceeds of like checks of the lumber company issued by S. M. Masters in payment of his individual indebtedness. Eight of these suits, for claims aggregating \$3160.36, were pending at the time of the trial of this cause below, one of which is now before us on appeal. In one plaintiff had recovered a judgment for \$1000, which was paid. And one claim for \$31.50 had been paid in full while in suit.

Certain declarations of law requested by defendant were refused. They need not be here set out; the questions raised concerning their refusal, so far as here of consequence, will be noticed below.

In view of the agreed facts submitted we think that it was incumbent upon the trial court to enter the judgment appealed from. Under the decisions of our courts defendant must be held to have taken these checks charged with notice that funds of the Masters Lumber Company were being drawn upon to pay the private indebtedness of its officers. The rule of decision has long prevailed in this State to the effect that one accepting a check of a corporation, drawn by an officer thereof in payment of his private obligations, takes the risk of be-

ing required to restore the proceeds thereof, in an action as for money had and received, in the event that corporate funds were thereby misapplied. [See *Kitchens v. Teasdale Com. Co.*, 105 Mo. App. 463, 79 S. W. 1177; *St. Louis Charcoal Co. v. Lewis*, 154 Mo. App. 548, 136 S. W. 716; *Coleman v. Stocke*, 159 Mo. App. 43, 139 S. W. 216; *Reynolds v. Gerdelman*, 185 Mo. App. 176, 170 S. W. 1153; *Reynolds v. Title Guaranty Co.*, 189 S. W. 33; *Blake v. Bank*, 219 Mo. 644, l. c. 666, 118 S. W. 641; *St. Charles Savings Bank v. Edwards Brokerage Co.*, 243 Mo. 553, 147 S. W. 978; *Reynolds v. Whittemore*, 190 S. W. 594.]

Defendant, in its answer, and by the agreed statement of facts as well, admits that these checks, so drawn, were accepted and used by it under the circumstances set forth above; and consequently the burden was cast upon defendant to show that S. M. Masters was lawfully authorized and entitled to so draw upon the corporate funds for his private purposes. [See *Reynolds v. Whittemore*, *supra*; *Bank v. Brokerage Co.*, *supra*.]

In this connection appellant seeks to here invoke the provisions of an act of the Legislature of 1917, Laws 1917, p. 143, purporting to alter the law governing cases of this general character, as established by the decisions in this State. That statute is as follows:

"Section 1. Liability of corporation, firm or copartnership.—If any check, draft or order of any corporation, firm or copartnership shall be given in payment of the debt of any officer, agent or employee, of said corporation, firm or copartnership, the payee or other person collecting such check, draft or order shall not be liable to said corporation, firm or copartnership therefor, unless it shall be shown that such payee or other person, at the time of collecting same, had actual knowledge that said check, draft or order was issued without authority of said corporation, firm or copartnership."

"Sec. 2. Conflicting acts repealed.—All laws and parts of laws in conflict or inconsistent with this act are hereby repealed."

But it is quite manifest that the case before us, in which judgment was entered below on July 14, 1916, is in no wise affected by this statute enacted in 1917. It is argued that the statute affects the remedy only—"relates to matters of practice and procedure," and has a retrospective operation. In this connection many authorities are cited, but it is unnecessary to refer to them here. Putting aside all other questions which this contention suggests, it is entirely clear that we, sitting as an appellate court, cannot rule that the lower court fell into error in failing to apply or conform to a statute not then in existence. The court followed the last controlling decision of the Supreme Court, which is likewise binding upon us since this statute cannot affect the rights of the parties on appeal. [See Sec. 2083, Rev. Stat. 1909.]

That the Masters Lumber Company was not indebted to S. M. Masters and Marcus S. Masters at the time when these various checks were drawn stands admitted. On the contrary the accounts of both were overdrawn at all such times. The question as to the right of either S. M. Masters or Marcus S. Masters to draw any salary, none having been provided by resolution, is raised and discussed in the briefs, but we need not notice it. It is entirely clear that the entry made on the books by S. M. Masters attempting to increase his salary from \$175 per month, which he had been drawing with the consent of the directors and stockholders, to \$275 per month, and crediting himself with such increase for a prior period of one year, was wholly ineffective. He could not thus arbitrarily increase his compensation as an officer. Assuming that S. M. Masters was entitled to take credit for a salary of \$175, and that Marcus S. Masters was entitled to be credited with the salary which he drew, both were constantly indebted to the company during the entire period in which these checks were issued monthly.

But it is argued that under the conceded facts plaintiff trustee is estopped to recover in this action; this being a defense interposed by the answer. It is said that all of the directors and stockholders of the Masters Lumber Company permitted the course of dealing aforesaid,

i. e. permitted S. M. Masters to draw corporate checks, as he pleased, for his private purposes, charging the amounts thereof against himself on the company's books; that under these circumstances the corporation will be held to have ratified such acts, and to be estopped to recover from one who had accepted any such check or checks; and that plaintiff trustee is in no better position in that respect than would the corporation were it suing.

The agreed facts, stated above, do not make it clear that all of the directors and stockholders consented to the unlawful acts of S. M. Masters, so as to estop the corporation from prosecuting an action of this character. It does not appear that Johnson consented to these acts of S. M. Masters with full knowledge of the particular transactions in question. [See St. Charles Savings Bank v. Investment Co., 160 Mo. App. 369, l. c. 379, 380, and cases cited. 140 S. W. 921.] And there is enough in the agreed statement of facts from which to infer that Rice, whose consent does not appear, remained a stockholder of record. But, however this may be, the trustee in bankruptcy, this plaintiff, sues not merely in behalf of the corporation or its stockholders, but as the representative of the creditors of the corporation as well. And certainly the creditors of the Masters Lumber Company have done nothing whereby to estop their representative from prosecuting an action to recover the corporate funds which were wrongfully diverted and misappropriated in the manner above set forth. In this connection see: Manufacturing Co. v. Carriage Co., 152 Mo. App. 401, 133 S. W. 412; Tube Works Co. v. Machine Co., 118 Mo. 365, 22 S. W. 947. In the case last cited, l. c. 376, it is said;

"A corporation has no right as against its creditors to apply its assets in satisfaction of the debts of other persons which it is under no obligation to pay. It is said: 'A corporation cannot give away its property or transfer it, unless in good faith for value, if its creditors would thereby be left unsecured' (2 Morawetz on Private Corporations, sec. 789). We are unable to make a distinction between directly giving away the property and

using it in payment of the private debts of its officers. Either would be fraudulent as to creditors (Morawetz on Corporations, sec. 792)."

The argument is advanced that since each check received and cashed by defendant was for an amount less than the salary of S. M. Masters for the current month (i. e. \$175), with the exception of two checks, he was lawfully entitled to draw the checks upon the corporate funds (with the exception of the two mentioned) and charge the same against his account for salary. But this argument we think is clearly without merit. Granting that S. M. Masters was entitled to draw such salary, and that neither the corporation nor its creditors would have been injured had he merely taken his salary by means of checks drawn and used as were the checks in controversy, it does not follow that there was no misappropriation of corporate funds in issuing checks for amounts within his monthly salary. As stated above, S. M. Masters was heavily overdrawn on the company's books during all of the period in which the checks were issued. If he was entitled to a salary, he had so far overdrawn his account by January 1, 1910, that he was indebted to the company in a sum exceeding \$1500, and thereafter his indebtedness greatly increased. Giving him full credit for his salary, he was at no time, during the period with which we are immediately concerned, entitled to draw checks upon the corporate funds in payment of his individual indebtedness.

It is further argued that in any event the plaintiff cannot recover, as for a wrongful diversion of the corporate funds, for the benefit of creditors of the Masters Lumber Company whose present claims were not in existence, in whole or in part, when such diversion occurred. And it is contended also that if the trustee is entitled to recover for the benefit of creditors whose accounts against the lumber company were in existence when defendant received any of these checks, then a recovery of only a part of the total amount claimed by plaintiff may be had, for the reason that the amount sought to be recovered in this action, together with the amounts recov-

ered or sought to be recovered in the ten other like actions, instituted by the trustee as above stated, exceeds, it is said, the claims of creditors thus entitled to share in the benefit of any such recovery.

It is unnecessary to set forth the elaborate argument of counsel touching the matter, for we think that it proceeds upon a fallacious theory. It is true that the Masters Lumber Company, under the active management of S. M. Masters, by creating new obligations, succeeded in paying off in large part—though not in whole—those who were creditors during the period of time in which these checks were given to defendant. But the company was largely indebted when the first of these checks was issued to defendant, and its indebtedness rapidly increased during all of the period mentioned. From and after July 31, 1910, the corporation was insolvent, and its insolvency merely became more hopeless as time went on, until its bankruptcy in June, 1914, when, as said, it owed \$48,442.22 and had on hand no assets worth mentioning; a large part of its corporate assets, which constituted—in a well understood sense—a trust fund for the benefit of creditors, having in the meantime been diverted to pay the private debts of its officers. With these facts in view we see no merit in the argument that “subsequent creditors” were not prejudiced by these wrongful acts of S. M. Masters. And we are of the opinion that the case of Reynolds v. Faust, 179 Mo. 29, 77 S. W. 855, relied upon by appellant in this connection, has here no application.

It is urged that in equity and good conscience defendant should not be required to restore the proceeds of these checks, taken by it in good faith for the purposes and under the circumstances mentioned. The answer to this is that under the established rule of decision in this state, which is here unaffected by the statute, *supra*, such a check carries upon its face notice of its “irregular and illegal character” (St. Louis Charcoal Co. v. Lewis, *supra*), and the taker thereof incurs the risk of being required to respond to the corporation or its successor in law as for having wrongfully received

corporate assets. This doctrine we cannot depart from, were we disposed to do so, since our duty is made plain by controlling decisions of the Supreme Court, binding upon us.

We perceive no reversible error in the record and it follows that the judgment should be affirmed. It is so ordered. *Reynolds, P. J., and Becker, J., concur.*

DOUGLAS W. ROBERT, Appellant v. RIALTO
BUILDING COMPANY, Respondent.

St. Louis Court of Appeals. Opinion Filed December 4, 1917.

1. **TRIAL PRACTICE: Instructions: Credibility of Witnesses.** Where there was a direct conflict in the testimony, not reasonably attributable to mistake, inadvertence, or lapse of memory, an instruction as to the credibility of witnesses was proper.
2. **APPELLATE PRACTICE: Review: New Trial.** On appeal from an order granting a new trial, the appellate court is not confined to the grounds assigned by the trial court in sustaining the motion but may take into consideration other grounds thereof, and will affirm the ruling if it appear that the granting of the new trial was proper on any ground of the motion—with the qualification, however, that where the trial court has impliedly overruled an assignment in the motion that the verdict is against the weight of the evidence, the appellate court will not affirm the ruling granting a new trial, if erroneous on the ground or grounds assigned, and not otherwise justified, by holding that the verdict is against the weight of the evidence and that for this reason the granting of the new trial was proper, since to do so would require that the appellate court weigh the evidence; though the appellate court may uphold the granting of the new trial if the verdict is supported by no substantial evidence.
3. **BAILMENTS: Evidence: Question for Jury.** Evidence as to receipt of property by defendant as bailee, *held*, sufficient to go to the jury.
4. ———: **Instructions: Evidence: Prima-facie Case.** An instruction that if the jury found that plaintiff delivered the property to defendant or its agent, and that defendant failed or refused to return the same on demand, then to find for plaintiff, *held* not improper,

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though defendant was a gratuitous bailee, where defendant claimed that the property had been returned to plaintiff and this—aside from the question as to the agent's authority—was the only issue tried.

Appeal from the Circuit Court of the City of St. Louis.
—Hon. George H. Shields, Judge.

REVERSED AND REMANDED (*with direction*).

Brownrigg, Mason & Altman for appellant.

It was not error to give the instruction on the credibility of witnesses. There was a decided conflict in the testimony. The circuit court misconstrued the case of *Keeline v. Sealy*, 257 Mo. 497; *Weller v. Laboratories Corp.*, 191 S. W. 1056; *Volk v. Zepp*, 190 S. W. 609; *Dawson v. Flintom*, 190 S. W. 972; *Schuler v. Life Ins. Co.*, 176 S. W. 274; *Price v. Building Construction Co.*, 191 Mo. App. 395.

Blodgett & Rector for respondent.

(1) The action of the trial court in granting the defendant a new trial should be upheld because the verdict of the jury was clearly against the weight of the evidence. (2) It was gross error to read to the jury instruction No. 1 offered by the plaintiff, in view of the fact that at most defendant was only a gratuitous bailee and liable only for gross negligence. Story on Bailments, l. c. 63; *McKenna v. Walker*, 85 Mo. App. 570; *Taussig v. Shields*, 26 Mo. App. 318; *Wiser v. Chesley*, 53 Mo. 547; *Mason v. Stockyards Co.*, 60 Mo. App. 97; 3 Ruling Case Law, sec. 27, p. 102; *Townsend v. Meagher*, 44 Mo. 368. (3) The trial court's action in granting defendant a new trial on account of the erroneous giving of instruction No. 5 of the court's own motion was proper. *Keeline v. Sealy*, 257 Mo. 527.

ALLEN, J.—This action was instituted before a justice of the peace to recover the value of three chairs,

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which, it is charged, were received by the defendant corporation from plaintiff "for safe-keeping and delivery of same" to plaintiff, and which defendant refused to so deliver on plaintiff's demand. The trial before the justice of the peace resulted in a judgment for plaintiff and on defendant's appeal to the circuit court and a trial there *de novo*, before the court and a jury, there was a verdict and judgment for plaintiff in the sum of \$40. Thereafter, the court sustained defendant's motion for a new trial upon the ground that the court had committed error in giving an instruction to the jury, of the court's own motion, on the credibility of witnesses and the weight to be given to their testimony. From the order granting such new trial plaintiff prosecutes the appeal before us.

It appears that plaintiff, an attorney at law, became a tenant of the defendant on March 1, 1912, upon which date plaintiff moved his law office from another building in the City of St. Louis to the "Rialto Building," taking with him certain office furniture, including six "reception-room chairs;" and that for lack of room in his new quarters plaintiff requested one Gus Wichman, "janitor" of defendant's building, and said by plaintiff to have been in charge thereof, to take three of these chairs and store them for plaintiff for a time. It is undisputed that Wichman received the three chairs at or about the time when plaintiff became a tenant of the building. The remaining three of the six chairs were placed in plaintiff's lobby or reception-room constituting a part of his offices in the building. It seems that the three chairs delivered to Wichman were placed by him in his "private office," on the same floor on which plaintiff's offices were situated.

Plaintiff's testimony is that the three chairs which had been delivered to Wichman were never returned. On or about March 1, 1914, plaintiff moved from the building, as stated above, and shortly prior to that date plaintiff made demand upon Wichman for the three chairs in controversy. Plaintiff's testimony is that when such demand was made, Wichman said that he did not have

the chairs and did not know where they were; that thereupon plaintiff and Wichman made search in the attic of the building and throughout all the floors thereof but were unable to locate the chairs; that in the latter part of April or early in May, 1914, Wichman came to plaintiff's office and, for the first time, asserted that the chairs had been previously delivered to plaintiff.

In behalf of defendant the testimony is that the three chairs left with Wichman on about March 1, 1912, were delivered to plaintiff, at the request of a stenographer then in plaintiff's employ, by depositing them in his lobby or reception-room in the Rialto Building some time in the summer of 1912. Wichman testified that pursuant to this request he ordered his assistants, one Kolen and Kalisch, to take the chairs to plaintiff's office, and that this was done in the latter part of June or early in July, 1912. And this witness declared that when plaintiff made demand for the chairs, about March 1, 1914, he then told plaintiff that they had been previously returned. Kolin and Kalisch testified that they took three chairs to plaintiff's office in the summer of 1912; and plaintiff's former stenographer—who was with plaintiff but for a few months during that summer—testified that she received the chairs.

Plaintiff, however, denying that the chairs in controversy were ever returned to his office, testified that during all of the time that he occupied offices in the Rialto building he had but three of the original six chairs in his lobby or reception-room. And an attorney, who had previously been a member of plaintiff's former law firm, and who was familiar with the six reception-room chairs mentioned, testified that after plaintiff moved to the Rialto building he was in the latter's offices there almost daily until about October 1, 1912, in connection with matters of business in which he and plaintiff were interested, and that during all of that period he saw but three of these chairs in plaintiff's lobby or reception-room.

Touching the matter of Wichman's authority, plaintiff testified that Wichman was in charge of the Rialto

building during the period in question; that there was no one "in the building over him;" that it was defendant's custom to take care of any furniture for a tenant in the building and store it, usually in the attic; and that no furniture could be removed from the building without Wichman's permission.

Wichman at first testified that it was not the custom of the building company to store furniture for tenants, and that the attic contained boxes "and a lot of stuff," but no furniture. Later he said that there was some "old scratched chairs up there and so on, if you want to call that furniture." And still later in his testimony he admitted that he had often had tenants ask him to take charge of furniture for them and that he had done so; that he had placed desks in the attic as well as in his office; and that this had been his practice.

An employee of a trust company, which acted as agent for the Rialto building, testified that his duties included the general management of the building, leasing and renting offices, etc., and that he employed the head janitor and engineer; that Wichman's duties were "to look after the general upkeep of the building, the cleaning and so forth, and to take care of any ordinary requests of the tenants, furnishing keys or anything of that nature." He stated that he knew, at the time, that Wichman had charge of plaintiff's three chairs, having seen them in Wichman's office.

I.

The instruction given by the court on the credibility of witnesses, for the giving of which the new trial was granted, is the ordinary instruction of that character, and among other things tells the jury that if they believe that any witness has sworn falsely to any fact or facts material to the issues in the case then the jury are at liberty to reject all or any portion of the testimony of such witness. It appears that upon the authority of *Keeline v. Sealy*, 257 Mo. 498, 165 S. W.

1088, the court concluded that reversible error was committed in giving the instruction. A reading of that opinion, however, will disclose that the giving of a like instruction was held to be error for the reason that there was nothing in the testimony in the case to afford a basis for the giving thereof. With that opinion before us we have more than once held that the giving of an instruction of this character is not error where there is a direct conflict in the testimony as to a material fact, or material facts, which cannot reasonably be attributed to mistake, inadvertence or lapse of memory; i. e. where there is contradictory evidence in the record of such a nature that the jury may with propriety find that a witness or witnesses wilfully gave false testimony as to a matter or matters material to the issues. [See *Schuler v. Met. Life Ins. Co.*, 191 Mo. App. 52, l. c. 74, 75, 176 S. W. 274; *Price v. Bldg. & Const. Co.*, 191 Mo. App. 395, l. c. 404, 177 S. W. 700; *Cohen v. Terminal Ry. Co.*, 193 Mo. App. 69, 181 S. W. 1080; *Volk v. Zepp*, 190 S. W. 609; *Weller v. Plapao Laboratories Corporation*, 191 S. W. 1056, l. c. 1060.] And see the opinion of the Kansas City Court of Appeals in *Dawson v. Flintom*, 190 S. W. 972.

The trial court, we think, misapprehended the effect to be given to the opinion in *Keeline v. Sealy*, *supra*. Indeed in the more recent case of *Hall v. Coke & Coal Co.*, 260 Mo. 351, 168 S. W. 927, an instruction of this indential character is expressly approved; the case being one wherein a conflict in the testimony existed of such character as to afford a basis for the giving of such instruction.

That there is a "sharp conflict" in the testimony in the record before us is conceded in the brief of counsel for respondent. And it is quite clear to us that the conflicting and contradictory testimony, as to material matters, is of such character as to afford a sufficient basis for the giving of the instruction in question under the rule stated above. The testimony of plaintiff is at direct variance with that of defendant's witnesses in certain material respects, and *Wichman's* testimony is

in part self contradictory. And these conflicts and contradictions cannot, *in toto*, reasonably be attributed to mistake, inadvertence or lapse of memory.

We think therefore that the court erred in granting a new trial upon the ground assigned.

II.

It is quite true that the rule is that upon an appeal from an order sustaining a motion for a new trial we are not confined to the ground or grounds of the motion on which the trial court predicated its order, but may take into consideration other grounds of the motion pointed out by the respondent. And the action of the trial court should be affirmed if it appear that the granting of the new trial was proper, for a reason or reasons set up in the motion, though the trial court may have assigned an improper or insufficient reason for its action (Benjamin v. Railroad, 245 Mo. 598, 151 S. W. 91; Barr v. Hays, 172 Mo. App. 591, l. c. 598, 599, and cases cited, 155 S. W. 1095); with the qualification, however, that where the trial court, as here, has impliedly overruled an assignment in the motion that the verdict is against the weight of the evidence (See Kelly v. City of Higginsville, 185, Mo. App. 55, l. c. 58, 171 S. W. 966), we cannot affirm the ruling granting a new trial, if erroneous on the ground or grounds assigned, and not otherwise justified, by finding that the verdict is against the weight of the evidence and that for this reason the granting of the new trial was proper—as appellant's counsel appear to have assumed. To do so would require that we, an appellate court, weigh the evidence in the case, which we are without authority to do in an action at law. After verdict, it rests exclusively with the trial court, who saw the witnesses and heard them testify, to determine whether or not the verdict should be set aside as being against the weight of the evidence; and where that court has refused to set aside the verdict on that ground it is not for us to say that it ought to have determined otherwise; though we may uphold the ruling granting a new trial upon the

ground that the verdict is supported by no substantial evidence, if such be the case. [See Adam Roth Gro. Co. v. Hotel Co., 183 Mo. App. 429 l. c. 440, 166 S. W. 1125.]

III.

It is urged, however, that the trial court erred in refusing to peremptorily direct a verdict for defendant as requested and that the order granting a new trial should be affirmed on this ground. The argument advanced in this connection proceeds upon the theory that no authority on the part of Wichman was shown whereby to make defendant liable for his act in receiving the chairs for safe-keeping. But we think that the evidence, as stated above, is sufficient to support a finding that the chairs came into the custody of the defendant corporation, and that the case made was one for the jury.

IV.

It is further insisted that the granting of the new trial was proper for the reason that the court erred in giving an instruction for plaintiff as follows:

"You are instructed that if you believe from the evidence that the plaintiff delivered to the defendant, or its agent, for safe-keeping, three chairs, and the defendant or its agent accepted said chairs and kept them, and thereafter the plaintiff demanded the return of said chairs, and the defendant or its agent failed, or refused to return said chairs to the plaintiff, and has not delivered them to the plaintiff, then your verdict must be for the plaintiff."

It is argued that defendant was shown to have been at most a gratuitous bailee, the chairs having been accepted and stored merely as a favor to plaintiff, and that therefore defendant was responsible only for the failure to exercise, in respect to the property, that care which is taken by the most inattentive and thoughtless person with respect to his own affairs; whereas this instruction makes defendant an insurer.

In this connection it may be observed that the record before us does not show that defendant offered any

instructions other than two which were, in effect, the converse of plaintiff's instruction complained of, and which directed a verdict for defendant if the jury believed that the chairs were returned. Defendant's counsel in their brief refer to another instruction said to have been offered by defendant and refused, but it is, of course, not before us.

But, in any event, we think that it was not error to give plaintiff's instruction mentioned, under the circumstances of the case. There were no pleadings in the case. Plaintiff's statement before the justice was one in the nature of an account. Defendant filed no answer, its appearance raising the general issue. Granting that defendant was merely a gratuitous bailee, evidence going to show the bailment and defendant's refusal or failure to return the property on demand, sufficed to make out a prima-facie case for plaintiff, casting the burden upon defendant to account for the property. [See *Wiser v. Chesley*, 53 Mo. 547; *Standard Milling Co. v. Transit Co.*, 122 Mo. 258, 1. c. 275, 26 S. W. 704; *Bockserman v. Railroad*, 168 Mo. App. 168, 1. c. 173.] Had plaintiff charged that the property was lost while in the possession of defendant as bailee, through the latter's negligence, a different rule would apply. [See *Standard Milling Co. v. Transit Co.*, *supra*, 1. c. 275, 276; *Bockserman v. Railroad*, *supra*.] And had defendant undertaken to avoid liability on the ground that the property had been lost or destroyed while in its hands under circumstances such as to exonerate defendant therefor under the law relating to the liability of a gratuitous bailee, quite a different situation would be presented. But defendant did not do this. Aside from the testimony touching the matter of *Wichman's* authority, defendant's evidence was all directed to an effort to show that in fact the property had been returned to plaintiff. This was the issue tried; there being no suggestion of any loss or destruction of the chairs while in the custody of the defendant or its agent.

We think that the granting of the new trial cannot be sustained on the ground that it was error to give this instruction.

We are therefore brought to the conclusion that the trial court was not warranted in setting aside the verdict and awarding the defendant a new trial. While we are reluctant to interfere where the trial court has seen fit to grant a new trial—and will not do so where the matter involves the exercise of discretion on the part of the trial judge, unless a clear abuse of such discretion appears—nevertheless, where the order granting the new trial proceeds from an erroneous conclusion of law, and is not otherwise justified, it becomes our duty to set aside the ruling, in order that the appellant may not be deprived of the benefit of the verdict rendered in his behalf through a mistaken belief on the part of the trial judge that an error of law was committed at the trial.

The order granting a new trial is reversed and the cause remanded, with directions to the circuit court to reinstate the verdict and duly enter judgment thereon. *Reynolds, P. J., and Becker, J., concur.*

BRIDGET McCULLEN, Respondent, v. FISHELL BROTHERS AMUSEMENT COMPANY, Appellant.

St. Louis Court of Appeals. Opinion Filed December 4, 1917.

1. **PLEADING: Construction: Sufficiency of Petition after Verdict.** After verdict and judgment, a petition is not open to attack, if by reasonable implication or fair intendment it sets up facts sufficient to constitute a cause of action.
2. **TRIAL PRACTICE: Demurrer to Evidence: Inferences.** In passing on a demurrer to plaintiff's evidence, the evidence is to be viewed in the light most favorable to plaintiff; and every inference fairly and legitimately deducible therefrom should be drawn in his favor.

3. **NEGLIGENCE: Master and Servant: Actions: Evidence.** In an action against the proprietor of a theater for the wrongful death of one who fell through an open trapdoor, evidence held to warrant a finding that the trapdoor had been opened and left open by the proprietor's servant, acting in the scope of his authority.
4. —: "Invitee," "Licensee," Who are: Distinguished. Where deceased, an expressman, came to defendant's theater to do some hauling, in which defendant was mutually interested with deceased's employer, and went upon the stage in the course of that business, and, in the darkness fell through an open trapdoor which defendant's servant had left open, deceased was an "invitee," being upon the stage for the mutual benefit of his employer and defendant, and hence defendant was bound to exercise ordinary care for his protection; deceased as an "invitee" distinguished from a "licensee" not being upon the stage for his own pleasure or benefit.

Appeal from the Circuit Court of the City of St. Louis.

—Hon. Thomas C. Hennings, Judge.

AFFIRMED.

Holland, Rutledge & Lashly for appellant.

(1) The petition does not state cause of action. It alleges that appellant maintained an open trapdoor and that deceased, while lawfully on the premises, fell through same. There is no allegation of an invitation. The owner of premises owes no duty to trespassers or mere licensees to keep the premises in reasonably safe condition. *O'Brien v. Western Steel*, 100 Mo. 182; *Straub v. Soderer*, 53 Mo. 38; *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284; *Whittee v. Stifel*, 126 Mo. 295; *Butz v. Cavanagh*, 137 Mo. 503; *Benson v. Baltimore Traction Co.*, 77 Mo. 535; *Sterger v. Van Sticklen*, 132 N. Y. 499; *McGill v. Compton*, —Ill. 327; *Evansville v. Terre Haute R. R.*, 100 Ind. 221; *Muench v. Heine-mann*, 96 N. W. (Wis.) 800; *Ryerson v. Bathgate*, 51 Atl. 708; *Manning v. Railroad*, 16 L. R. A. 271; *Redigan v. Railroad*, 14 L. R. A. 276. (2) (a) The peremptory instruction asked by appellant should have been given. While there was testimony that appellant was to receive a portion of the receipts of the firm of Wilson & Jones, there was no evidence that appellant was to take

any part in the business of said firm or share the losses thereof. Therefore, there was no partnership relation between the firm of Wilson & Jones and appellant. Mackie v. Mott, 146 Mo. 230; Sille Hardware & Iron Co. v. McCleverty, 89 Mo. App. 154; Mulholland v. Rapp, 50 Mo. 42; Bank of Odessa v. Jennings, 18 Mo. App. 65; Hansom v. Jones, 20 Mo. App. 595; Weise v. Moore, 22 Mo. App. 530; Hach v. Hill, 160 Mo. 18; Lockhart v. Forsythe, 49 Mo. App. 654; Ileyerle v. Hunt, 50 Mo. App. 541. (b) The firm of Wilson & Jones, while operating on the stage of appellant's theater, was operating as an independent contractor, and appellant was not liable for any negligence on the part of said firm. Burns v. McDonald, 57 Mo. App. 599; Kaiser v. Suppe, 133 Mo. App. 29; Burnes v. Railroad, 129 Mo. 41; Byre v. Jordan, 111 Mo. 428. (c) Where one normally and generally in the employ of A is loaned by A to B and operates under B's direction, such person is temporarily the servant and agent of B. and B. alone is liable for his negligent acts. Healy v. Wrought Iron Range Co., 161 Mo. App. 482; Hardy v. Shedden Coal Co., 477 U. S. App. 362; Standard Oil Co. v. Anderson, 212 U. S. 215; Nason v. Railroad, 22 U. S. App. 220.

Ryan & Thompson for respondent.

(1) The objection that the petition fails to state facts sufficient to constitute a cause of action should be ruled against appellant. Appelgate v. Railroad, 252 Mo. 173; Robinson v. Seay, 175 Mo. App. 713; Schneider v. Johnson, 164 Mo. App. 639. (2) Plaintiff's deceased husband came upon defendant's premises as an invitee of defendant and defendant owed him the duty of protecting him against traps and pitfalls. Glazer v. Rothschild, 221 Mo. 180; Appelgate v. Railroad, 252 Mo. 173; Moore v. Corte, 77 Mo. App. 500; Welsh v. McCallister, 15 Mo. App. 492; Bennett v. Railroad Co., 102 U. S., 585; Northwestern Electric R. Co. v. O'alley, 107 Ill. App. 599, 604; Cleveland, etc., Railway Co. v. Powers, 88 N. E. 1073 (Ind.); Note in 46 L. R. A. 59; Burner v. Higman, 127 Iowa 590; Sheyer v. Lowell, 134 Cal. 357;

Tobin v. Railroad Co., 59 Mo. 185; Kinchlow v. Elevator Co., 57 Kan. 374; Atlanta Cotton Seed Oil Mills v. Coffey, 80 Ga. 145; Panckner v. Wakern, 231 Ill. 276.

ALLEN, J.—Plaintiff is the widow of Andrew J. McCullen, deceased, and sues to recover damages for his death resulting from injuries sustained by him by reason of falling through an opening or “trapdoor” in the floor of a stage in a theatre building operated by defendant in the city of St. Louis.

It is charged that defendant negligently allowed the trapdoor to remain open, and that on July 6, 1913, plaintiff’s husband, while lawfully upon the premises, and in the exercise of due care, fell through the opening to the floor below sustaining injuries from which he died on October 2, 1913. The answer contains a general denial and a plea of contributory negligence, and alleges that plaintiff’s husband was not invited upon the premises and had no right to be there.

The trial, before the court and a jury, resulted in a verdict for \$5000 in plaintiff’s favor, and from a judgment accordingly entered thereon the defendant prosecutes the appeal.

The evidence discloses that during the period with which we are here concerned the defendant was a corporation with but three stockholders, viz., Dan Fishell, his brother, and a third person; the two stockholders other than Dan Fishell, being, it is said, merely “nominal stockholders.” Dan Fishell was president of the company, and was referred to by a witness as having been “the whole show.”

On and prior to July 6, 1913, defendant, engaged in conducting theatrical performances, was the lessee of a building known as the Princess Theatre, in the city of St. Louis, fronting on the east side of Grand Avenue near Olive Street. The stage, located in the east end of the building, extended across the entire building, i. e., from the south wall to the north wall, and it appears that in the floor thereof were a large number of trapdoors. Beneath the stage were basement rooms in which

defendant's theatrical properties were kept, the grani-toid floor of the basement being about eighteen feet below the level of the stage. In the south wall of the building was a large sliding door, operated by raising and lowering it, which opened from the stage upon an alley.

One Wilson and one Jones were actors in defendant's service, and had been with defendant for some years. In June, 1913, as the "theatrical season" was about to close, Wilson and Jones conceived the plans of forming a little theatrical company of ten persons from those who had been performing at defendant's theatre, for the purpose of giving certain performances during the summer of that year in "air-domes" in the city of St. Louis and elsewhere. It appears that when Fishell, defendant's president, learned of this, he summoned Wilson and Jones to his office on or about June 25, 1913, and, referring to the matter, said (as stated by Jones in testifying) that "he wanted to know where his bit was coming in," stating that he ought to get something out of the proposed venture. The evidence is that Wilson and Jones told Fishell that they could not give him any interest in the undertaking unless he would put something into it; that Fishell then suggested that they did not have the necessary wardrobe and scenery and would require a place for rehearsals, and that he would furnish these things. And it appears that after figuring out the "salary list" it was agreed that the defendant would furnish the wardrobe, scenery and theatre for rehearsals; that Wilson and Jones would pay the salaries of the members of the company, paying themselves each \$50 a week as salary; and that the surplus over and above all expenses would be divided between the defendant and Wilson and Jones, defendant receiving fifty per cent. thereof. It was agreed, however, that defendant was not to bear any part of the losses, if any. It appears also that, at the instance of Fishell, it was then agreed that the "company" would be increased from ten to sixteen members.

One Nortemann was defendant's "property man," having been in defendant's employ for nearly three

years. He was the custodian of defendant's wardrobe and stage scenery, and kept the key to the room in which these articles were stored. And the evidence is that, when the foregoing matters had been agreed upon, defendant's president called Nortemann into his office and in the presence of Wilson and Jones instructed Nortemann to give them whatever properties they might want; and that it was arranged that whenever Wilson and Jones might thereafter desire any of the properties they would notify Nortemann who was instructed to get them out and deliver them at the theatre.

It further appears that on June 26, 1913, defendant's president again called Wilson and Jones into his office and told them that he had arranged with the manager of "Delmar Garden" for the "company" to play the following week at that place, but it seems that for some reason this was not done. And it is said that defendant's president sent out a great many letters to various towns in Missouri and Illinois, endeavoring to "book" the company in those places.

After having given certain performances in the city of St. Louis this little company was engaged for a performance at a certain air-dome in that city, to be given on the evening of Sunday, July 6, 1913; and on the morning of that day Jones met Nortemann, by appointment, at defendant's theatre for the purpose of getting out certain stage properties of defendant for use in giving the performance mentioned, including a "drug store counter." It appears that Nortemann knew what properties were desired and proceeded at once to get them out. He raised one of the trapdoors in the defendant's stage, laid it against the rear or east wall of the building, and with the help of a watchman raised the counter from the basement through the trapdoor opening and placed it upon the stage floor. It was found to be too long for the purpose for which it was desired, and Nortemann procured a saw and set about sawing off a portion of it. In the meantime the trapdoor, which, it is said, was about six feet in length and three feet wide, was left open. The opening was about three feet from the east wall, or rear

of the stage, and about fifteen feet north of the sliding door opening upon the alley. The evidence is that Nortemann allowed the trapdoor to remain open for the reason that he intended to lower to the basement that portion of the counter which was not to be used; and in this connection he testified that it was his duty to "put back all the stuff." And according to Nortemann's testimony the trapdoor remained open a half hour or more.

Andrew J. McCullen was a drayman or "expressman," and either Wilson or Jones had previously arranged with him by telephone to bring an express wagon to haul the properties which they were to take from defendant's theatre on that Sunday morning. While Nortemann was engaged in sawing the counter, McCullen drove his wagon into the alley mentioned and up to the sliding door opening upon the stage. Jones met him at this door and upon looking at his wagon told him that it was not large enough. There is a slight but immaterial conflict in the testimony as to precisely what occurred at this time. It appears that either McCullen asked permission to use the telephone to call up his "boss" and have a larger wagon sent, or that McCullen stated that he could get the properties on the wagon and that Jones took issue with this and told him to come in and look at the articles to be hauled. In any event McCullen, following Jones, entered the doorway and was proceeding across the rear of the stage, where it was quite dark as compared with the brightness of day without, when he stepped into the opening mentioned and fell to the granitoid basement floor below, receiving injuries which later, to-wit, on October 2, 1913, caused his death. Jones testified that while crossing the stage, in advance of McCullen, he spoke to the latter saying, "look out for the trapdoor;" but if the witness did this, it does not appear that McCullen heard him.

Nortemann, who had been regularly in defendant's employ for years, was never employed by Wilson and Jones "under salary." Jones said: "We would probably tip him a little money." He received nothing from Jones, by way of a tip or otherwise, on the Sunday mentioned.

He testified that Wilson paid him during the following week, in Jacksonville, Illinois; that Wilson gave him one dollar for "that work" and for what he "had coming up there."

I.

The first contention of appellant is that the petition wholly fails to state a cause of action. The argument of appellant's counsel is that by merely alleging that McCullen "was lawfully on said stage" the petition does not charge that McCullen was on the premises by the invitation of appellant; and that unless the deceased was an invitee, and not a mere licensee, appellant owed him no duty except not to wilfully injure him. But after verdict and judgment a petition is not open to attack if by reasonable implication or fair intendment it sets up facts sufficient to constitute a cause of action. And tested by this rule we think that this petition—which was not attacked below except by an objection to the introduction of evidence in the nature of a demurrer *ore tenus*—is amply sufficient to support the judgment. The allegation that the deceased was lawfully upon the premises is broad enough to include the idea that he was there by the express or implied invitation of the defendant, and it may well be inferred that plaintiff intended that this allegation should be so taken. We consequently disallow this assignment of error.

II.

It is earnestly contended that the trial court erred in refusing to peremptorily direct a verdict for defendant, but we regard it as quite clear that this assignment of error is without merit. There is indeed but little, if any, conflict in the evidence, but in so far as any conflict may be said to exist it is elementary that in passing upon the demurrer the evidence is to be viewed in the light most favorable to plaintiff, giving plaintiff the benefit of every favorable inference which may be fairly and legitimately drawn therefrom.

That the evidence warrants the conclusion that in leaving open the trapdoor, while sawing the counter,

Nortemann was acting as defendant's servant, in the pursuit of defendant's business, cannot well be doubted. He was the custodian of defendant's property and as such he was delivering it pursuant to defendant's directions. And according to his testimony he left open the trapdoor in order to replace in the basement the portion of the counter which was not to be used, for the reason that it was his duty, as defendant's servant, to so replace all articles not used. But this is by no means the entire case made by plaintiff. The evidence goes to show that McCullen was on the premises at the implied invitation of defendant, by reason whereof defendant owed him the duty to exercise ordinary care to keep its premises in a reasonably safe condition, free from dangerous traps and pitfalls. This follows from the evidence adduced showing that the defendant corporation was interested with Wilson and Jones in the undertaking for which the little theatrical company was formed; defendant having an interest in the profits, in consideration for which defendant furnished a place for rehearsals, wardrobe and scenery. And it appears that defendant's president took an active part in the management of the business pertaining to the enterprise. It thus appears that McCullen came to defendant's theatre that Sunday morning upon a matter of business in which defendant, Wilson and Jones were all interested, and for a purpose—to-wit to take from defendant's premises the very properties which defendant had agreed to supply in the undertaking mentioned—which was for the mutual benefit and advantage of all parties to the immediate transaction. McCullen was there in the course of his business, or that of his employer, but the business was one for the defendant's benefit and advantage as well as for the benefit and advantage of the other parties interested with defendant in having the properties moved from defendant's building. Under these circumstances McCullen was upon defendant's premises as an invitee, by virtue of an im-

plied invitation to enter thereupon in the transaction of the business mentioned. And the fact that he was summoned by Jones or Wilson and not by defendant in no wise affects the application of the rule of law pertinent to the matter in hand.

In 17 R. C. L., p. 566, it is said: "The principle on which the courts distinguish a case of implied license from one of implied invitation, in the technical sense, seems to be this: Speaking generally, where the privilege of user exists for the common interest or mutual advantage of both parties, it will be held to be a case of invitation; but if it exists for the mere pleasure and benefit of the party exercising the privilege it will be held to be a case of licensee."

This statement of the text is amply supported by the authorities in this State and elsewhere:

In *Glaser v. Rothschild*, 221 Mo. 180, 1. c. 184, et seq., 120 S. W. 1, it is said:

"The general rule is that the owner or occupier of premises lies under no duty to protect those from injury who go upon the premises as volunteers or merely with his express or tacit permission from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier.

* * * *

"But the situation with reference to liability radically change when the owner invites the use of his premises for purposes connected with his own benefit, pleasure and convenience. . . . The rule applicable to that change is that a licensee who goes upon the premises of another by that other's invitation and for that other's purposes, is no longer a bare licensee. He becomes an invitee and the duty to take ordinary care to prevent his injury is at once raised, and for the breach of that duty an action lies.

* * * *

"The word 'invitation' used in the rule covers and includes in it enticement, allurements and inducement, if

the case in judgment holds such features. . . . So, too, it is held in all the cases that the invitation may be implied by any state of facts upon which it naturally and reasonably arises."

In this connection see also: *Appelgate v. Railroad*, 252 Mo. 173, 158 S. W. 376; *Pauckner v. Wakem*, 231 Ills. 276; *Bennett v. Railroad*, 102 U. S. 577.

Applying the foregoing sound and well established rules of law to the facts disclosed by this record, we have no hesitation in holding that the demurrer to the evidence was properly overruled.

Complaint is made of the giving of plaintiff's main instruction covering the case and directing a verdict, being the only instruction given for plaintiff with the exception of one on the measure of damages. This instruction is quite lengthy and it is unnecessary to here set it out, since the attack made upon it is fully disposed of by what we have said above.

Error is also assigned to the refusal of the court to give a number of instructions asked by the defendant. These need not be discussed in detail. They either proceeded upon erroneous theories as to the legal effect of the evidence adduced, or were not supported by the evidence. A careful examination of all of them reveals that the court committed no error in refusing them.

We perceive no reversible error in the record, and it follows that the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

THE ORNSTEIN & RICE NECKWEAR COMPANY,
A CORPORATION, Appellant, v. HIRSHFIELD
SKIRT COMPANY, a Corporation, and ED-
WARD MALLINCKRODT, Respondents.

St. Louis Court of Appeals. Opinion Filed December 4, 1917.

1. **LANDLORD AND TENANT: Damages from Overflowing Drains: Evidence.** In an action by a tenant against his landlord and an-

The Ornstein & Rice Neckwear Co. v. Hirshfield Skirt Co.

other tenant for damages to a stock of goods, caused by water from an overflowing sink on an upper floor, evidence *held* to warrant a directed verdict for the landlord on the question of negligent construction of pipes and drains.

2. ———: ———: **Question for Jury.** In an action by a tenant for damages to a stock of goods caused by water from an overflowing sink of an upper tenant, evidence *held* sufficient to take to the jury the question of whether a drain was stopped and a cock left open through the negligence of the upper tenant.

Appeal from the Circuit Court of the City of St. Louis.—
Hon. James E. Withrow, Judge.

REVERSED AND REMANDED (*with directions*) as to the first defendant, and AFFIRMED as to the second defendant.

Perry Post Taylor, Emil Mayer and Ben L. Shifrin
for appellant.

(1) It was error to sustain the demurrer to the evidence and to give the peremptory instruction offered by the defendant Hirshfield Skirt Company at the close of plaintiff's case, and error to overrule appellant's motion to set aside the nonsuit as to that defendant, when the evidence showed and tended to show that appellant was damaged from an overflow of water due, in part at least, to the fact that a water faucet used by that defendant and in that part of the premises then exclusively occupied by it had been negligently left open and turned on; because (a) It is negligence to leave a water faucet open and turned on over night so that damage to other tenants may result therefrom. *Killion v. Power*, 51 Pa. State, 429 (432); *Chicago Tel. Co. v. Commercial Union, etc.*, 131 Ill. App. 248 (251); *Simon Reigel C. Co. v. Gorden B. B'y Co.*, 20 N. Y. Misc. 598 (599). (b) When the proof shows and tends to show, as is the case here, that an upper-floor tenant was in exclusive possession of such floor; that a water faucet on that floor was found open and turned on and water running therefrom; that such water overflowed and run down and damaged the goods of a lower tenant; then *prima facie*, the presumption is that the leaving open of the faucet was the act of the upper floor tenant or of some

one (employee, customer or those lawfully in his premises) for whose act he is responsible. *Killion v. Power*, supra; *Chicago Tel. Co. v. Commercial Union, Etc.*, supra; *Simon Reigel Co. v. Gordon B. B'y Co.*, supra; *Curran v. Weiss*, 6 N. Y. Misc. 138; *Greco v. Bernheimer*, 17 do. 592; *Simonton v. Loring*, 68 Maine, 164; *Rosenfeld v. Arral*, 44 Minn. 395; *Hill v. Scott*, 38 Mo. App. 370 (374). Where property in the keeping of a defendant is found to be in a dangerous condition and on account of such dangerous condition, plaintiff is injured, the inference is that such condition is attributable to defendant or his employees. *Crawford v. Kansas City Stock Yards Co.*, 215 Mo. 394 (418). (c) An upper-floor tenant is liable to a lower-floor tenant for damage to the latter's goods where the evidence shows, either directly or inferentially, that such flowing of water is due to the negligence of the upper-floor tenant or of those for whose acts he is responsible. Authorities under (a) and (b), supra. (d) It makes no difference if the damages were also due to the fact that the drain pipe was obstructed and that without such obstruction the water would not have overflowed and caused damages, for, in spite of that obstruction, there would have been no damage had the faucet been turned off. If damage is proximately caused by the negligent acts of two different parties, both or either will be liable. *Harrison v. Kansas City E. L. Co.*, 195 Mo. 606 (627). (e) In sustaining the demurrers to the evidence and giving the peremptory instructions, when there was evidence showing that damage was caused to appellant by water flowing from premises occupied by and under the control of defendant, the court below disregarded the rule that "all evidence and inferences unfavorable to appellant must be disregarded and all evidence and all reasonable inferences favorable to him must be taken into consideration." *Frankel v. Hudson* (Mo. Sup., July, 1917), 196 S. W. 1123; *Hauser v. Bieber* (Mo. Sup. in banc, June, 1917), 197 do. at p. 70. (2) Also, for the reasons stated and under the authorities cited in 1 supra, the court below erred in sustaining the demurrer to the evidence and giving the

peremptory instruction offered at the close of the plaintiff's case by the defendant, Edward Mallinckrodt, since the evidence showed and tended to show that he furnished the water to the tenants of the building and was, therefore, responsible for the general condition of the means (pipe, etc.) by which it was so furnished and that the water pipe in question was so obstructed that the water would not drain off and overflowed to appellant's damage.

Gustave L. Stern and *Marvin E. Boisseau* for respondent, *Hirshfield Skirt Co.*

(1) (a) There was no evidence of negligence on the part of said defendant. 24 Cyc, 1122; 2 Underhill on Landlord and Tenant, p. 839; *Rosenfield v. Newman*, 159 Minn. 156; *Becker v. Bullowa*, 73 N. Y. S. 944; *Steinway v. Beck*, 37 N. Y. S. 678; *Tentzler v. Erlanger*, 117 N. Y. S. 158; *Tucker v. Roberts*, 17 N. Y. S. 378, affirmed 138 N. Y. 606; 3 *Farnham on Water and Water Courses*, sec. 988; *Stevens v. Woodward*, 6 Q. B. D. 318; *McCord Rubber Co. v. St. Joseph Water Co.*, 181 Mo. 678; *McCarthy v. Fagin*, 42 Mo. App. 619. (b) It is not negligence to leave a water faucet running, even if there had been any evidence that said defendant did so. *Lane v. Scagle*, 67 Vt. 281, 31 Atl. 289.

S. Mayner Wallace and *Shepard Barclay* for respondent, *Mallinckrodt*.

(1) The peremptory instruction for a verdict for the landlord was correct, because there was no proof of the negligence charged in the petition as to him, namely: omission to ascertain whether the faucet was turned on, before turning on the water which had been turned off. Only such negligence as is alleged may be proven. A different cause of action, if proven, would not support a finding or verdict on such allegations. Such proof would be a failure as to the different cause alleged. *Grisamore v. Ry. Co.*, 118 Mo. App. 387; *Edy v. Railroad*, 77 Mo. 34; *Gurley v. Railroad Co.*, 93 Mo. 450;

Conway v. Railroad, 24 Mo. App. 235; Bromley v. Lumber Co., 127 Mo. App. 151; Pointer v. Const. Co., 269 Mo. 105; McGrath v. Transit Co., 197 Mo. 97. (2) There was no proof that the water was turned off by any one and then turned on again by the landlord or his agents. So there was a failure of proof as to the case alleged. R. S. 1909, sec. 2021. (3) The petition does not state a cause of action as to the landlord. It avers that these two tenants occupied the third and fourth floors of the building, and that a faucet on the Hirshfield premises was carelessly left open whereby the damage by water resulted to plaintiff's goods on the third floor; but, even if the landlord was to supply the water, those facts created no liability for any open faucet on a tenant's premises. Carstairs v. Taylor, L. R. 6 Ex. 217; Whitehead v. Comstock, 25 R. I. 421, 56 Atl. 446; Clifton v. Mackauf, 150 N. Y. Supp. 555; Blake v. Woolf (1898), 2 Q. B. D. 426. (4) Apart from the failure of proof as to the specific charge in the petition against this defendant, no negligence of any sort was shown as to him. The water appliances were sufficient to carry off all the flow from this faucet running "at its full capacity" (Abs. p. 16). The tenants were "to keep the water pipes and plumbing in good order" (Abs. pp. 47; 98). Nothing done or omitted by the landlord was shown to have contributed to plaintiff's damage. Even if a defective condition of the pipes existed, and by reasonable care on the part of the tenant in possession damage would not have ensued, the landlord is not liable. McCord Co. v. Water Co., 181 Mo. 678; M'Carthy v. Bank, 74 Me. 315, 43 Atl. 591; Sheldon v. Hamilton, 22 R. I. 233, 47 Atl. 316; Mellen v. Morrill, 126 Mass. 543; Kenny v. Barnes, 67 Mich. 336, 34 N. W. 587; Lee v. McLaughlin, 86 Me. 413; Rickards v. Lothian, (1913), A. C. 263. (5) On the facts in evidence, the intervention of possession of the premises by these tenants respectively deprived the landlord of such control of the faucet in question as might otherwise have made him responsible for allowing the outlet pipe of the sink to be clogged or choked, so as to produce an over-

flow. Rickards v. Lothian (1913), A. C. 263; Mendel v. Fink, 8 Ill. App. 378; Haizlip v. Rosenberg, 63 Ark. 430, 39 S. W. 58; Cooper v. Lawson, 139 Mich. 628; Lebensburger v. Schofield, 155 Fed. 85; Lederer v. Fox, 151 Ill. App. 300; Eyre v. Jordan, 111 Mo. 424. (6) No causal connection between the injury and any act or omission of this defendant appeared from the facts and circumstances in evidence. Rosenfield v. Newman, 59 Minn. 156, 60 N. W. 1085; Tentzer v. Erlanger, 117 N. Y. Supp. 158; Greene v. Hague, 10 Ill App. 602; Pembroke Co. v. Rogers, 125 Pac. 866, 41 Utah 411; Stevens v. Woodward, 6 Q. B. D. 318; Buckley v. Cunningham, 103 Ala. 449, 15 So. 826. (7) If there was a defective or obstructed condition of the escape pipe from the water sink on the fourth floor that condition was not proven by plaintiff to have existed when the letting of those premises took place; and without such showing there would be no liability on the part of the landlord. Ward v. Fagin, 101 Mo. 669; McKeon v. Cutter, 156 Mass. 296, 31 N. W. 389; Roberts v. Cottey, 100 Mo. App. 500.

BECKER, J.—Plaintiff sued the defendants below for damage to its stock of goods resulting from the alleged negligence of the defendants in allowing water under their control to flood plaintiff's merchandise. At the close of plaintiff's case the court gave a peremptory instruction to the jury to find against the plaintiff and in favor of each of the defendants, whereupon plaintiff took an involuntary nonsuit and after an unavailing motion to set the same aside, brings this appeal.

Plaintiff below, appellant here, occupied the third floor of the building at 901-5 Washington Avenue, St. Louis, Missouri, for the purpose of carrying on its business of manufacturing and selling neckwear at wholesale. The building was a seven story commercial structure owned by the defendant Mallinckrodt, the several floors of which were occupied by various tenants. The defendant, Hirshfield Skirt Company, was, at the time

that the plaintiff alleges it sustained its damage, occupying the fourth floor of the building where it conducted a business of manufacturing and selling skirts at wholesale.

On the morning of the day in question, namely, Monday, June 4, 1913, when plaintiff's place of business was opened, water was found to be dripping from the ceiling of the third floor, which was caused by a sink in the toilet room on the fourth floor overflowing, the water flowing into said sink from a partly open faucet. The water dripping onto plaintiff's merchandise was the cause of the alleged damage of which plaintiff sues the said skirt company and the owner of the premises to recover the damage thus sustained.

The petition, after alleging the ownership and tenancy of the building, alleges that the "Skirt Company, its servants, agents and employees negligently and carelessly allowed and permitted a water faucet located in that portion of said building and premises occupied by said defendant skirt company to be and remain open and turned on and water was permitted to run from said faucet, so left open and turned on, and to overflow and to soak through the floor and drip and run through and upon the portion of the stock of merchandise so maintained by plaintiff on said third floor of said building so that a portion of said stock was damaged, ruined and rendered worthless; that because of the negligence and carelessness of the defendant Mallinckrodt and of his agents, servants and employees in charge of said building and premises, the water upon said premises which, at the time said faucet has been, as aforesaid, left open and turned on, was turned off, but that said defendant Mallinckrodt, his aforesaid agents, servants and employees negligently and carelessly turned said water on without first ascertaining whether or not any faucets in said building might be so left as to cause said water to overflow and to damage the property of the tenants of said building, and particularly of this plaintiff; and that by reason of the negligence and carelessness of the defendant, Hirshfield Skirt Company, in permitting

said faucet to be turned on and left open, and of said defendant, Mallinckrodt, and his agents, servants and employees in turning on said water when said faucet was so left open and turned on, and further by reason of the negligence and carelessness of both said defendants and of their agents, servants and employees, in so maintaining the water pipes, sinks, drains and water fixtures of said building, that the water, when so turned on, could not be carried through the proper channels, such water was in the manner aforesaid, permitted to and it did overflow, leak through said fourth floor and drip and pour upon the aforesaid property of the plaintiff, causing, as aforesaid, same to be and become damaged, ruined and rendered worthless."

Then followed an itemized list of the property alleged to have been damaged; an allegation of damages in the sum of \$760.78 and a prayer for judgment in that amount with interest and costs. The answer of each of the defendants was a general denial.

Plaintiff, to prove its case, introduced its lease with the defendant landlord in which we find the following provisions: "That lessee and all holding under it agree to use reasonable diligence in the care and protection of said premises during the term of this lease; to keep the water pipes and plumbing in good order; . . ." Plaintiff also introduced the lease from the defendant owner of the building, to the defendant, Hirshfield Skirt Company, which lease contained the following: "The lessee further agrees . . . that they will keep the water, gas pipes and also the plumbing in good order . . . that they will keep the plumbing connections of the premises occupied by them open and in good order; that they will pay the water license for said premises according to the regulations of the water department of said city."

The plaintiff, to sustain its cause of action, then introduced the secretary of the defendant company, J. Laskowitz, who testified that the defendant skirt company occupied the fourth floor and that the plaintiff occupied the third floor of the building on the day in ques-

tion; that it was his invariable custom to open up his place of business in the morning at five minutes past seven, he having the only key to the premises, and that he did the same on this particular morning; that he had locked up the premises the night before and that the premises when he opened them the following morning were just as he left them; that no one else had access to the premises after he locked them; that Robert Farrell, the porter for the defendant skirt company arrived about the same time that he did and both entered the premises; that he heard the water running and saw some water spread out over the floor and upon investigation he found the water faucet, which was in the wash room partitioned off from the rest of the premises, was turned on, "just one way a little bit," "one-fourth or a fraction over," "make it three-eighths;" that the particular faucet from which the water was running was a conventional faucet with a lever to turn the water on and off, and underneath the faucet was what might be termed an ordinary kitchen sink; that he found the sink full of water and the water running over. He immediately turned off the faucet and the water in the sink ran down very slowly through the drain; that he put his hand down into the sink to ascertain whether there was anything to stop the flow of the water but he found nothing. In answer to the questions, he testified as follows: "Q. The drain was sufficient to carry off the water at its full capacity, was it? A. Yes, sir; of course I gave the porter instructions to keep that open, to see that the thing was clean from any stuff that was there. . . . "Q. And on that morning you saw nothing in the sink that impeded the flow of the water? A. Not a bit in the sink." He testified that the sink was the only wash stand that was on the floor and that some times they had as high as forty or fifty people employed and that the male employees used the sink to wash their hands in, usually as they were about to leave, and he watched, "that thing." "Q. Who left that faucet turned on? A. Nobody left the faucet turned on; the faucet was not turned on. Q. It was not when

you left? A. No, sir, it was turned off when I left; no water running when I left, because that is my work.

Q. You are the last one to leave? A. Yes, sir.

Q. And also the first one to be there? A. Yes, sir.

Q. You do the locking up of the shop? A. Yes, sir.

Q. When you came there in the morning, this small jet was running? A. A little stream running.

Q. No obstacle at all? A. No, sir. The court,

Q. No porter nor anybody else had a key but you?

A. No, sir. . . . Q. Did these holes (meaning the perforations in the outlet of the sink) ever get stopped up by people throwing in matches or cigarettes or cigar stumps? A. Yes, sir; it got stopped up but we took care of that. . . . Q. You mean to say that this water faucet got turned on of its own accord; that no one left it on. A. That is what I said."

The plaintiff then put on the porter of the said defendant skirt company as their witness. He corroborated the witness Laskowitz, that as he entered the building with him they found the water was overflowing the sink and flowing onto the floor; that he immediately went to the third floor, occupied by the plaintiff company, and saw water on the boxes containing the merchandise of the plaintiff company, and could see where the water had dripped down from the ceiling above.

Several witnesses testified for plaintiff as to the water dripping from the ceiling, and that the water had fallen onto the merchandise of the plaintiff company, and testified as to the amount of the damage. There was testimony to the effect that some twenty-five by thirty feet of the ceiling was wet and the water dripping down from the ceiling and from the beams supporting it.

E. Hirshfield, the president of the defendant skirt company, was put on the stand. He testified that on the 4th day of June, 1913, the defendant skirt company occupied merely the front half of the third floor under a lease from the owner of the building, and that the toilet and wash room was for the joint use of themselves and such tenant as might occupy the other portion of the

said third floor, but that on that date there was no tenant occupying the other portion of the floor, but that they had entered into a new lease whereby they were to take possession of the entire floor some time later.

The sole question to be determined here is whether or not plaintiff, on the facts as shown in the record, was entitled as against either of the defendants, to go to the jury.

In considering demurrers to the evidence and peremptory instructions at the close of plaintiff's case, "all evidence and inferences unfavorable to appellant must be disregarded and all evidence and all reasonable inferences favorable to him must be taken into consideration." [Buesching v. St. Louis Gas Light Co., 73 Mo. 219; Frankel v. Hudson (Mo.), 196 S. W. 1. c. 1123 Hanser v. Bieber (Mo.) 197 S. W. 1. c. 70.]

We will first take up the question as to the peremptory instruction given by the court, that the jury under the pleadings and evidence must find for the defendant, Edward Mallinckrodt, the owner of the building. The allegations of negligence in plaintiff's petition as to the defendant, Mallinckrodt, are set out above in our statement of facts.

The written leases introduced by plaintiff, under which leases both the plaintiff and the defendant skirt company occupied premises in the building for a term of years, specifically provide that the water and the plumbing was to be kept in good order by the lessees. That fact taken together with the testimony that the drain of the basin was sufficient to carry off all the water, even when the faucet was turned on to its full capacity, and there being no evidence of any defective condition or construction of the basin or water pipes, attributable to the landlord, and no evidence offered that the defendant, landlord, or any of his agents, servants or employees, turned on any water in the building without a previous investigation as to whether the faucet was open, the plaintiff clearly failed to make out a case, and the court properly gave the peremptory in-

struction for the jury to find in favor of the defendant, Mallinckrodt.

We next come to the question as to whether, under the record, the plaintiff has made out a sufficient case to go to the jury against the defendant skirt company.

There was evidence that the defendant skirt company occupied the front half of the fourth floor under a written lease and that no other tenant occupied any part of the balance of the floor on the day on which the damage was sustained by plaintiff. The secretary of the defendant company testified that the wash room in which the faucet and sink in question were located, was used by the company's male employees, and that he personally made it his business each evening before leaving the building to see to it that the faucet was turned off and no obstacle in the sink, and that on the night previous (meaning undoubtedly on the Saturday night previous, a Sunday intervening, the record showing that the damage was discovered on Monday morning) before leaving he had examined the faucet in question and found that it was turned off; that he was the last man to leave the premises and had locked the premises. He further testified that he was the man who unlocked the premises on Monday morning and that to all appearances no one had been there in his absence. That on entering he found the water overflowing and the faucet turned on perhaps three-eighths of its capacity; that he examined the drain of the sink but found nothing to obstruct the flow of the water; that the water drained off very slowly but later in the day the drain again carried off the water even when the faucet was turned on full force; that he did not know what caused the temporary obstruction. He testified that the water had overflowed onto the floor from the sink. There was evidence that the water had wet a space on the wall beneath of some twenty-five by thirty feet, and that the water dripped down onto the plaintiff's merchandise on the floor below and damaged same.

Added the fact that the defendant skirt company's lease contained the provisions that: The lessee further

agrees. . . . "that they will keep the water, gas pipes and also the plumbing in good order . . . that they will keep the plumbing connections of the premises occupied by them open and in good order; that they will pay the water license for said premises according to the regulations of the water department of said city."

Are then the facts as we have stated them sufficient to warrant the submission to the jury of the question whether the defendant skirt company was guilty of negligence?

While the secretary of the defendant skirt company testified that when he left the premises the night previous the water was turned off, we know of no rule of law which would obligate the jury to find from that testimony that the faucet was in fact turned off when the witness left. The other facts in the case seem to us sufficient from which the jury could infer that the witness was mistaken and that the faucet was in fact partly open when the witness left the night before, and from the fact of the extent to which the water had spread and gone through the ceiling below, that the faucet had been running a considerable period of time. Inferences of this kind, when based on sufficient facts, are clearly within the province of a jury.

In the case of *Chicago Telephone Co. v. Commercial Union Insurance Co.*, 131 Ill. App. 248, the court held on facts very much similar to the present case, that the burden was upon the appellee (defendant) to disprove the inference of negligence arising from its control of the wash room and the presence of its employees immediately proceeding the overflow. In other words, the responsibility for overflow of water was held to depend upon the question of control and responsibility held to rest with the landlord or tenant as the case may be, according to who is in control of the source or cause thereof and where an overflow is established the presumption is that the same resulted from the fault of the party in control of the cause or source thereof.

In *Killion v. Power*, 51 Pa. State Rep. 429, we find a case in which an action was brought for negligence

for leaving open a stopcock in the third floor of a store occupied by the defendant and thereby flooding with water the store of plaintiff in the basement. One Hughes, who was a customer of the defendant, while on the premises had gone to the third floor of the building and was heard at the stopcock by one of the employees and was told there was no water there, the water at that moment being turned off in the street where repairs were being made. The inference is that Hughes turned the cock and finding no water left it so. The appellate court sustained the view of the trial court that if Hughes came upon the premises with the express or implied assent of the defendant or his servants, and with the like express or implied assent turned on the water and left it running and the defendant failed to turn it off again, there was evidence of negligence on the part of the defendant. "There was ample evidence here that Hughes was not a mere trespasser. If Hughes came there by permission and was permitted to use the water, certainly it was negligence, under the facts of this case, not to see to the condition of the cock before the store was closed for the day. The stopcock was in the third story occupied exclusively by the defendant and where plaintiff had no right to go. When the defendant or his servants left the store, filled as it was with valuable goods, of course it must be locked up. A duty lay upon him to take care that so dangerous a thing as this stopcock was under the circumstances, should not be left open to flood the store of his neighbor below stairs. The maxim *sic utere tuo ut alienum non laedas*, has here its most apposite application. It would be such negligence as entitled the plaintiff to recover."

In the case of *Rosenfield v. Arrol*, 44 Minn. 395, with reference to cases like we have at bar, it is said: "Negligence, which is the want or absence of ordinary care, is the gist of the action, and the burden was upon the plaintiffs to prove facts from which it could be fairly be inferred that the defendant's negligence was the proximate cause of the injury. The evidence need not be direct and positive. The fact of negligence in any

given case is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact. The plaintiffs were not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and of resulting injury to themselves. Having done this they were entitled to recover unless the defendant produced evidence sufficient to rebut this presumption."

In *Slater v. Adler*, 8 Misc. Rep. (N. Y.) 310, the court said: "Where there are two tenants in occupation of the premises, one being above the other, while it is true there is no contractual relation between them, yet each is bound to see to it that no injury shall happen to the other by reason of any negligence on his part. The case shows that there may have been a stopcock on the floor occupied by respondent's assignors which could be reached by both them and the appellant, yet the evidence makes it clear that there was also a stopcock on the floor of the appellant's premises, and that the water which ran on the respondent's premises flowed through that stopcock into barrels, from which there was a waste pipe which probably, from some cause which does not appear, became choked up. This made the appellant liable." [*Moore v. Hoedel*, 34 N. Y. 532; *Eakin v. Brown*, 1 E. D. Smith, 36; *Totten v. Phipps*, 52 N. Y. 356.]

This court in an opinion by THOMPSON, J., in *Hill v. Scott*, 38 Mo. App. l. c. 374, adopts the doctrine quoted in that opinion as follows: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of ordinary care."

We hold that the plaintiff made out a case sufficient to go to the jury as against the defendant, Hirschfeld Skirt Company. The court below, by taking the case away from the jury as against said defendant, de-

prived appellant of a right which it was entitled to. This was prejudicial error.

As to the defendant, Edward Mallinckrodt, the judgment of nonsuit is affirmed; but as to the defendant, Hirshfield Skirt Company, the judgment is reversed and the cause remanded with directions to the trial court to set aside the nonsuit and grant the plaintiff a new trial. *Reynolds, P. J.*, and *Allen, J.*, concur.

JOHN PEETZ, Respondent, v. ST. LOUIS TRANSFER COMPANY, A CORPORATION, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 6, 1917.
Opinion Filed December 4, 1917.

1. **MASTER AND SERVANT: Injuries to Servant: Knowledge of Master of Dangerous Condition: Question for Jury.** In an action for injuries to a transfer company's teamster while unloading a wagon, whether defendant transfer company knew, or by the exercise of ordinary care should have known, that nails were protruding from the bed of the wagon, and that the wagon would be used for the delivery of freight, *held* a question for the jury.
2. ———: ———: **Dangerous Condition: Sufficiency of Evidence.** In such action, evidence *held* to justify the jury in inferring that the nails in the position found had been driven in the bed of the wagon to secure cleats, and left there when the cleats had been removed, and to warrant the jury in inferring that the wagon with the nails in the bottom of its bed had been in defendant's possession and under its control long enough, that is, a reasonable time, to charge defendant with knowledge of the presence of the nails.
3. ———: ———: **Contributory Negligence of Servant.** Where a transfer company's driver took charge of its wagon, first about dark, and then early the next morning, when it was heavily laden, he was not chargeable with contributory negligence in failing to see nails in its bed, on one of which he tripped.
4. ———: ———: **Safe Place to Work: Liability.** An employer is under a plain duty to use ordinary care in providing its employee with a reasonably safe place in which to work, under penalty of liability for injuries to the employee through its default.
5. ———: ———: **Case for Jury.** In an action for injuries to a transfer company's teamster when he tripped over a nail in his wagon

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and had his leg crushed by a barrel of molasses, held a case for the jury under the evidence.

6. **TRIAL PRACTICE: Evidence: Objections in Trial Court.** Where no objection was made in the trial court to the line of examination and testimony as assuming a fact not in evidence, the admission of plaintiff's testimony as to the size of the nails brought to him from the bed of the wagon, and that they were similar to those in the wagon, was not error.
7. **MASTER AND SERVANT: Injuries to Servant: Evidence.** The fact that cleats had been nailed onto wagons of defendant, and the fact that nails were found in the bed of plaintiff's wagon in such a position as to warrant the inference they had been left there when the cleats were removed, made admissible evidence of the nailing of cleats on some wagons of defendant, without connecting it in any way with the wagon plaintiff used.

Appeal from the Circuit Court of the City of St. Louis.

—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

Kelley & Starke for appellant.

(1) The motion for nonsuit should have been granted, for the following reasons: (a) There was no evidence that defendant knew of the alleged existence of the nail or nails that are claimed to have caused the injury, nor is there any evidence that defendant in the exercise of ordinary care should have known of such nail or nails. *Henson v. Stave Co.*, 151 Mo. App. 234; *Wojtytak v. Coal Co.*, 188 Mo. 260, 281; *Pippin v. Construction Co.*, 187 Mo. App. 360; *Bowen v. Railroad*, 95 Mo. 268, 276. (b) Plaintiff had equal opportunity with defendant to notice that nail, if any nail were there, and was fully as capable of foreseeing such dangers, if any, as lurked in it. His contributory negligence bars recovery. *Lowe v. Railroad Co.*, 265 Mo. 587; *McGinnis v. Press Brick Co.*, 261 Mo. 287; *Pohlman v. Car & Foundry Co.*, 123 Mo. App. 219; *Rogers v. Packing Co.*, 185 Mo. App. 99. (c) The chance of the injury claimed to have been caused by that nail, if any were there, is so remote that defendant could not be expected to contemplate it; and therefore was not at fault in failing to

provide against it. *Halloran v. Pullman*, 148 Mo. App. 243; *Weesen v. Railroad*, 175 Mo. App. 374. (2) It was reversible error to allow a bundle of nails to be shown to the jury which plaintiff identified as having been shown him shortly after his injury, there being no evidence of any kind to show that the nails produced had any connection with the injury or with the wagon in which it occurred. It was only natural for the jury to think that the exhibited nails came from that wagon. (3) It was error to admit evidence of the nailing of cleats in some wagons used by defendant without connecting it in any way with the wagon involved in this case. Particularly is this true when the only evidence on the point was positive that no cleats had been put into that wagon.

Leahy, Saunders & Barth for respondent.

(1) The court did not err in overruling the defendant's motion for nonsuit, for the following reasons: (a) There was ample evidence to establish the fact that the defendant knew, or, by the exercise of reasonable care, might have known of the existence of the nails that caused the injury. The evidence established that nails of the size and description herein involved were frequently used upon the beds of wagons of the defendant and left protruding; that plaintiff had no regular wagon to drive, and was furnished with the wagon in question by the foreman of the company, which wagon had been left the afternoon prior to the injury in the charge of the foreman of the defendant. The law is well established that it is "the master's duty to use ordinary care to inspect and keep appliances and tools in a reasonably safe condition for the use of his servants" (*Deckard v. Railroad*, 111 Mo. App. 124). And further it is equally clear that "the duty of inspection is affirmative and must be continually fulfilled and positively performed. Anything short of this would not be ordinary care" (*Cody v. Lusk*, 187 Mo. App. 337). And, finally, it is the universal authority that the question of the master's

knowledge of the defect or his ability to have discovered the same by the exercise of this "ordinary care" is one "for the jury, and not for the court to determine." Schuerer v. Rubber Co., 227 Mo. 368; Tallman v. Nelson, 141 Mo. App. 478, 485; Coontz v. Missouri Pac. Ry. Co., 121 Mo. 652, 657-8; Deckard v. Railroad, 111 Mo. App. 117, 124; Covey v. Hannibal & St. Joseph Ry. Co., 86 Mo. 635, 641-2; Schuerer v. Railroad, 227 Mo. 347, 368; Cody v. Lusk, 187 Mo. App. 327, 337; Gordon v. Railroad, 222 Mo. 516, 528; O'Flanagan v. Railroad, 145 Mo. App. 276; Bassett v. Railroad, 166 Mo. App. 619, 624. (b) There is not a particle of evidence of contributory negligence in the record. Here, too, is an issue of fact to be resolved by the jury. There is not even evidence of knowledge on the part of the plaintiff of the lurking danger, and even though there were, by no possibility can it be said that the defect was so imminently dangerous that plaintiff was guilty of contributory negligence as a matter of law. Settle v. St. Louis & San Francisco R. R. Co., 127 Mo. 336, 341, 344; Houts v. Transit Co., 108 Mo. App. 686, 694; Bliesner v. Distilling Co., 174 Mo. App. 139, 147; Johnson v. Construction Co., 188 Mo. App. 105; Barnard v. Brick & Coal Co., 189 Mo. App. 417. (c) A tripping over a protruding nail or nails in the bed of a delivery wagon, left there by the negligence of the defendant, is by no means a "remote" consequence that "defendant could not be expected to contemplate." The apposite principle is thus announced: "It is not essential that defendant could have anticipated the very injury complained of, or that it would have anticipated that it would have occurred in the exact manner in which it did occur, but it is sufficient if the negligence of the defendant was the proximate cause of the injury." Bliesner v. Distilling Co., 174 Mo. App. 145; Dean v. Railroad, 199 Mo. 386, 411; Zeis v. Brewing Ass'n, 205 Mo. 638; Philips v. Railroad, 211 Mo. 419, 442; Buckner v. Horse & Mule Co., 221 Mo. 700, 710; Woodson v. Met. Street Ry. Co., 224 Mo. 685, 707. (2) By no stretch of circumstances could it have been reversible error for witness to have

referred to a bundle of nails shown to him, as answering the description of the character and size of "twenty-penny nails," which kind of nails witness testified were in the bed of the wagon. Moreover, the plaintiff, without objection on the part of defendant, had theretofore testified that those very nails were brought to him after the accident, by someone who claimed to have drawn them from the bed of the wagon. (3) It was in no sense error to admit evidence of the fact that nails were promiscuously driven in the beds of the defendant's wagons and allowed to protrude. Testimony on this point was invited by the defendant's own course of cross-examinations. Moreover, plaintiff had theretofore testified that he had "no regular wagon" to drive but was required to take any one that the foreman ordered.

REYNOLDS, P. J.—Action to recover damages for injuries said to have been sustained by plaintiff while unloading a wagon of a defendant which he had been driving, it being charged in the petition that while plaintiff was lifting or moving one of four barrels of molasses, which were part of his load, from the wagon, a nail protruding from the bed of the wagon caught in the sole of plaintiff's left shoe, tripped him, and caused the barrel which he was then lifting to fall with great force and violence on the lower part of his leg, causing a compound fracture of the leg, in consequence of which fracture he was confined to his bed and house for some time and forced to go on crutches for a long period. It is charged that defendant knew, or by the exercise of ordinary care would have known, that the bed of the wagon had nails protruding from it and that the wagon would be used for the delivery of heavy freight, and that the injuries to plaintiff were directly caused by the carelessness and negligence of defendant in suffering and permitting the nails to be and remain in the bed of the wagon.

The answer, after a general denial, pleaded contributory negligence and assumption of risk. To this a reply in the form of a general denial was filed.

On trial before the court and a jury there was a ver-fol-lowing, from which defendant, interposing a motion dict in favor of plaintiff in the sum of \$2500, judgment for new trial, as also one in arrest of judgment, and ex-cepting to the overruling of these motions, has duly ap-pealed.

There are a number of assignments of error but the points relied upon for a reversal are, first, that the court erred in failing to sustain demurrers at the close of plaintiff's case and again at the close of all the case, it being claimed that there was no evidence that defend-ant knew of the alleged existence of the nail claimed to have caused the injury, nor any evidence that defendant, in the exercise of ordinary care, should have known of the presence of such nail or nails; that because plain-tiff had equal opportunity with defendant to notice the nail, if any was there, and was fully as capable of see-ing the danger, if any, that lurked in it, and his contrib-utory negligence bars recovery; and that the chance of injury claimed to have been caused by that nail, if there was one there, was so remote that defendant could not be expected to contemplate it and was therefore not in fault in failing to provide against it.

It appears by the testimony in the case that about half past four or five o'clock on the evening of January 5, 1914, plaintiff, who had been in the employ of defend-ant for a number of years as a teamster, and had been engaged in that occupation for many years prior there-to, was instructed to hitch his team to a certain wagon belonging to defendant and carry a load of chicken feed, which was contained in burlap sacks, to a railroad freight house in East St. Louis. The bed of his wagon was fill-ed with these sacks, each sack weighing something like 100 pounds. He arrived with his load at the freight house in East St. Louis about half past five on the even-ing of January 5th, and the sacks were unloaded from his wagon by the men at the freight house, plaintiff standing by and checking off but not assisting in un-loading. After the unloading of the sacks he was given what is called "a clear receipt," that is, a receipt show-

ing that the burlap sacks had been delivered and were in good order. His wagon being unloaded, plaintiff drove it to one of defendant's barns at East St. Louis, and left it there for the night. The next morning at about 7 o'clock plaintiff hitched his team to the wagon and drove to several railroad warehouses in East St. Louis, and obtaining a load, drove across to St. Louis to the warehouses of several railroads on this side of the river and finally to the freight house of the Wabash Railroad Company. The load consisted of several cases of merchandise, placed in the front of the wagon, then twelve barrels of liquor or liquid of some kind, in three or four rows, and at the rear body of the wagon a parlor organ, cased or boxed, and four half barrels of molasses. The space occupied by this cased organ and these half barrels of molasses, was the width of the wagon bed or body, about eight feet, and extending along the rear end something like four feet. The rear end of the wagon, then to the east, was up against a platform of the Wabash freight house, which platform fronted west so that the organ in the case was in the northeast corner of the wagon bed. Next, and south of the organ, were the four half barrels of molasses, they occupying the southeast corner of the wagon bed, the barrels being placed 2 in a row and 2 deep. For purposes of convenience we designate the molasses barrel next to the organ case No. 1, the half barrel next and south of that as No. 2, the one in front and west of No. 1, as No. 3, and the one south of that as No. 4. It seems that these barrels and the organ case were fitted in very tightly—close together—so that to get them out, according to the testimony of plaintiff, he pulled out the barrel we have designated as No. 3 until it was clear of the other barrels and of the organ case, and then took hold of the chimes of barrel numbered 4 and was rolling that out when the sole of his left shoe caught, as he testified, on what he did not know at the time, and the barrel numbered 4, rolling over on him, pinned his left leg between that and No. 3, which had been rolled out, in

such a way as to break his leg about at the ankle, producing what is called "a simple fracture—a comminuted fracture of the tibia and fibula, which are the lower bones in the leg, on the left side in the middle and upper third, a simple fracture," as a surgeon who had attended plaintiff when he was taken to the city hospital testified. The wagon was described as a stake wagon 14 or 15 feet long and about 8 feet across. It was finally loaded at the Louisville & Nashville Depot in East St. Louis a little after 8 o'clock on the morning of January 6th. From there plaintiff drove it over to St. Louis, first, to the Rock Island Depot, where he discharged part of his load, then to that of the Missouri, Kansas & Texas Railroad Company, there unloading another part of his load, and then to the Wabash Freight Depot, where he arrived at about a quarter to eleven o'clock on the morning of January 6th, with the organ and four half barrels of molasses. As plaintiff testified, barrel No. 4 was on his leg, pinning him against No. 3, when persons to whom he called came and took him out from under the barrel and off the wagon. His left foot he testified, was caught on the left of the sole of the shoe on that foot. The men who carried him to the platform seated him on a box on the platform. Plaintiff testified that when he was taken off the wagon he saw a nail or nails in the bottom of the wagon. The men who were there had a policeman, who was nearby, call an ambulance; he was placed in that and carried to the City Hospital where his leg was set, placed in splints and then in a plaster cast. Remaining in the hospital a couple of weeks, he was removed to his own home, where he was confined for a number of weeks. Plaintiff testified that he suffered great pain from the accident and was disabled for some 6 months after it occurred. As there is no complaint made of the size of the verdict, it is unnecessary to go further into the evidence as to loss of time, suffering, etc.

Plaintiff testified very positively that when he took charge of the wagon on the evening of January 5th, and unloaded it, and again took charge of it on the morning

of the 6th, he saw no nails in the body of it, although he testified he was not looking for nails. Other witnesses, however, testified that it was customary for the defendant company when hauling rolls of rope or machinery of the type which has to be blocked, to have a cooper nail on strips or cleats on the floor of the bed of the wagon to hold the machinery or whatever was in the wagon in place. There were no cleats on the wagon in question at the time of its being loaded and unloaded on the occasion when plaintiff was handling it, but there was testimony of several witnesses to the effect that after the accident they saw from 3 to 6 nails—twenty-penny nails—some protruding above the floor of the wagon towards what was then the end. One or more of the nails appear to have been under the organ case, others under the barrels while in place. They were 7 or 8 inches apart and in a zigzag position, one of them projecting about half an inch above the body, others from a quarter to three-eighths of an inch. How long these nails had been in the wagon bed is not in evidence. While plaintiff was in the hospital a friend of his, who died before the trial of the cause, took a bunch of nails to him, which bunch was in evidence, and several witnesses said that the nails in the bunch shown to them at the trial were the kind of nails—twenty-penny nails—which had been driven into the wagon bed.

There was testimony on the part of defendant to the effect that none of its employees in authority knew of the presence of these nails, and while one of them, a manager or foreman, apparently, testified that cleats were fastened to their wagons on different occasions when they were hauling machinery, he further testified that the wagon which plaintiff was using at the time was not used for that purpose. But he also admitted that he was unable to say, as a positive fact, that no cleats had ever been driven on to this particular wagon. Plaintiff testified that they put the cleats on any wagon.

Under this statement of evidence we think it was a question for the jury to determine whether the defendant knew, or by the exercise of ordinary care could

have known, that nails were protruding from the bed of the wagon, and that the wagon would be used for the delivery of freight, and so the court, at the instance of plaintiff, instructed the jury as one of the elements necessary to recovery by plaintiff in this case. There was substantial evidence that there were from three to six nails in the bottom of this wagon bed, one or more protruding; also that plaintiff's shoe had been caught and held on a protruding nail and that while so held a barrel rolled on and crushed his leg. It was in evidence that defendant did, on various occasions, have cleats nailed to the floors of its wagon beds. On these facts the jury had a right to infer that the nails, in the position found, had been driven in for the purpose of securing cleats, and had been left there when the cleats had been pulled off. This must have been done prior to the time the wagon was turned over to plaintiff, for there is no pretense that any cleats were there when plaintiff first took the wagon. Before that occurred the wagon was in charge of defendant. The teamster who took charge of the wagon immediately after plaintiff had been injured, testified very positively that he saw and counted nails in the body of the wagon, one or more of them protruding above it, this witness testifying that when the wagon had been placed in his charge and had been unloaded, and while he was getting on it, he saw three nails sticking up out of the bed or floor about 5 feet from the rear end of the wagon across the bed, zigzagging and about 8 or 10 inches apart, two of them sticking up, that is not driven all the way down, one up about a quarter of an inch, another about three-eighths, and the third driven down. Those that he saw were straight.

On these facts the jury were warranted in inferring that the wagon with the nails in the bottom of the bed had been in possession and under control of defendant long enough, a reasonable time, to charge defendant with knowledge of the presence of the nails. It is true that plaintiff had an equal opportunity with defendant to notice that the nails were there, but he testifies very positively that he did not see them, and under the facts

attendant on his taking charge of the wagon, first about dark, then early the next morning, and his dealing with it, we do not think they were sufficient to charge him with contributory negligence in the matter. But this lack of knowledge on the part of plaintiff does not exculpate the employer. There was a plain duty resting upon the employer, as has been laid down in a multitude of cases, to use ordinary care in providing his employee with a reasonably safe place in which to work. That was a duty peculiarly resting on him and if he failed in that and the employee came to hurt in consequence of the negligence, the employer is responsible.

Nor can we agree that this case falls within the principle of *Halloran v. Pullman Co.*, 148 Mo. App. 243, 127 S. W. 946, or that of *Weesen v. Missouri Pacific Ry. Co.*, 175 Mo. App. 374, 162 S. W. 304, as claimed by learned counsel for appellant. A protruding nail, in a place over which people are required to walk and work, is a very present and patent sign of danger, an object from the presence of which in such a place it is to be anticipated that danger may result. Danger from it was not so remote as to render it improbable that there was danger to be apprehended from its presence.

Our conclusion on the contention made by learned counsel for appellant, that the nonsuit should have been granted is, that it is untenable.

The second point relied upon by learned counsel is that it was reversible error to allow the bundle of nails referred to, to be shown to the jury, it being claimed that there was no evidence of any kind to show that the nails produced had any connection with the injury, or that they came from this wagon. It is to be said of this, that they were not offered in evidence, or exhibited to the jury, as having been indentified. The fact that they were nails which had been taken out of this wagon bed after the accident, was admitted in evidence without objection.

On redirect examination of plaintiff by his counsel this occurred:

"Q. You were asked, on cross-examination, whether or not a man by the name of Reece brought some nails to you from the bed of this wagon? A. That was what he claimed. I could not say positively whether they were from that wagon or not. I never knew the size of the nail that was in the wagon, only I took his word for it.

"Q. Did he bring the nails to you? A. Yes, sir.

"Q. Are these the nails he brought to you? A. That is the same nails. Same nails and same string is on it."

It will be noticed that no objection was made to this line of examination, nor to this testimony, as assuming a fact not in evidence. Under this we find no error in the admission of the testimony concerning the size of the nails and that they were similar to those in the wagon.

The third point made by learned counsel for appellant, is to the effect that it was error to admit the evidence of the nailing of cleats on some wagons used by defendant, without connecting it in any way with the wagon involved in this case. It is true that there was no direct evidence that cleats had been nailed on this particular wagon. There was evidence, however, even on the part of defendant's witnesses, that it was a custom and habit and practice to nail cleats on the defendant's wagons when used for a particular purpose. True there was no direct evidence that cleats had been nailed to this particular wagon, but the fact that cleats had been nailed on to wagons of the defendant, coupled with the fact that nails were here found, in such a position as to warrant the inference that they had been left there when the cleats were removed, did make that evidence admissible.

Very general attacks are made on the action of the trial court in refusing certain instructions, other than those for a nonsuit, asked by defendant. We see no error in that action.

There is no complaint made of the size of the verdict in this case, and, as before remarked, it is unneces-

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sary to notice any of the evidence concerning the extent of plaintiff's injury.

Finding no reversible error in the trial of the cause, the judgment of the circuit court must be and is affirmed. *Allen* and *Becker, JJ.*, concur.

LEO TEGETHOFF, Respondent, v. FINNETTE
TEGETHOFF, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 8, 1917.
Opinion Filed December 4, 1917.

1. **DIVORCE: Appellate Practice: Desertion: Sufficiency of Evidence.** The appellate court, in passing upon a divorce case determines the case from the whole record, and while great deference is paid to the finding of the trial judge when sitting in such a case, his finding is not conclusive, and when the evidence shows that the plaintiff left the home, and that a separation agreement was made between the parties, the finding of the trial judge that defendant deserted plaintiff was erroneous.
2. ———: **Grounds: Indignities.** The alleged indignities held not sufficient to afford a statutory ground for divorce.
3. ———: ———: **Evidence: Sufficiency.** In a divorce action, the judge's finding that plaintiff husband was unaware of his wife's pregnancy at the date of marriage within Rev. St. 1909, section 2370, enumerating grounds for divorce, held not sustained by the husband's testimony in the face of evidence indicating that he was responsible for defendant's pregnancy.

Appeal from the Circuit Court of St. Louis County.—
Hon. Gustavus A. Wurdeman, Judge.

REVERSED AND REMANDED (*with directions*.)

Sam'l B. McPheeters, Fidelio C. Sharp, and Henry H. Oberschelp for appellant.

(1) Plaintiff was not entitled to divorce on the allegation that at the time of the solemnization of her marriage, defendant was pregnant by another man than

plaintiff unknown to him. (a) "Neither in old nor in modern times has it ever been allowed just to hold a child a bastard unless there is no judicial escape from that dire conclusion." *Nelson v. Jones*, 245 Mo. 579-594. (b) Presumption of legitimacy is strongest known to the law, and may be rebutted only by proof that the husband could not have been the father, as that he was impotent or could not have had access. 7 C. J. 945. (c) The declarations of a husband that a child born in wedlock is not his are not sufficient to prove its illegitimacy, even though it be born only three months after the marriage, and a separation between wife and himself take place soon thereafter. 3 R. C. L. 730. (d) Such issue will be held to be legitimate unless it be conclusively shown that a person other than the husband must necessarily and unavoidable have been the father. This doctrine applies *a fortiori* to cases of procreation before the marriage. *Bowles v. Bingham*, 5 Am. Dec. 497, 500, cited in 3 R. C. L. 730. (e) Evidence of a husband or wife as to access or non-access is excluded wherever the issue of legitimacy is involved, although the child was conceived before marriage. 3 R. C. L. 733. (f) The law is not willing that a child shall be declared a bastard to suit the whims or purposes of either parent nor upon evidence merely that no actual act of intercourse occurred between husband and wife at or about the time the wife became pregnant. The proof must be such as to show the impossibility of access. *Powell v. State of Ohio*, ex. rel. *Fowler*, 84 Oh. St. 165. (g) On grounds of public policy, affecting the children born during the marriage, as well as the parties themselves, the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them. The rule not only excludes direct testimony concerning such intercourse but all testimony of such husband or wife which has a tendency to prove or disprove legitimacy. *Jones Evidence* (2 Ed.), sec. 97 (96). (h) Where pregnancy of the wife by another man unknown to the husband at the time of marriage

entitled him to an annulment thereof, yet any want of due caution on his part, or any consent by him to the marriage after being aware of the facts rendered it indissoluble. 1 Bishop on Marriage, Separation & Divorce, sec. 484. (2) Plaintiff is not entitled to divorce on any of the alleged indignities which he claims rendered his condition intolerable. (a) There is no substantial or convincing evidence of alleged indignities such as to render his condition intolerable under the law. (b) Besides his falsely denying that he is the father of her baby and his baby precludes him from a divorce on ground of indignities. *Clinton v. Clinton*, 60 Mo. App. 296-299; *Miles v. Miles*, 137 Mo. App. 38 (3) Plaintiff is not entitled to divorce on allegation defendant absented herself from plaintiff without a reasonable cause for the space of one whole year and more. (a) His right to determine who shall reside in the house must be reasonably exercised. 9 R. C. L. 366. (b) There was no absence of consent by him to the separation and its continuance. There was no desertion if, at any time he acquiesced in the separation. The separation agreement of October, 1914, was in itself a bar to divorce on ground of desertion. *Clark v. Clark*, 143 Mo. App. 350, Syl. 2, 355; *Rogers v. Rogers*, 84 Mo. App. 197; *Davis v. Davis* 60, Mo. App. 545, l. c. 554-555. (c) The separation or alleged desertion and its continuance would have had to be without reasonable cause. *Davis v. Davis*, 60 Mo. App. 545, 556. (4). (a) The grounds of desertion and indignities are inconsistent, self-contradictory and destroy each other. He would be entitled to a divorce on ground of indignities only when they rendered his condition intolerable, which means that by reason thereof he could not and would not live with her, in which case he cannot claim desertion. By claiming desertion he admits he can live with her and wants to live with her, but that she refuses, in which case he certainly cannot say she rendered his condition intolerable. If she subjected him to such indignities as to render his condition intolerable, he cannot claim

he still wanted to live with her which is necessary for desertion. If he still wanted to live with her (necessary for desertion claim) then the indignities, if any, did not render his condition intolerable. (b) Likewise claims for divorce on the ground of pregnancy by another man and on the ground of desertion are inconsistent, self-contradictory and destroy each other. If he wanted to live with her (necessary for desertion claim) then he cannot claim the first alleged ground. If he claims the first alleged ground then he does not want to live with her and cannot claim desertion.

Roy Schooley and John E. Mooney, for respondent.

(1) Plaintiff is clearly entitled to a divorce on the allegation that at the time of the solemnization of the marriage, defendant was pregnant by another man than plaintiff unknown to him. (a) Appellant failed to take exception to respondent's testimony in the trial court that he had had no intercourse with appellant before the marriage and that he was not the father of her child and such exception cannot be raised here for the first time. No exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court. R. S. of Mo. 1909, sec. 2081. (b) A question not passed upon by the lower court at the trial cannot afterwards be injected into the cause by motion for new trial in the lower court, or by assignment or brief in the appellate court. *Hall v. Wabash, St. L. & P. Ry. Co.*, 97 Mo. 68; *St. Louis v. Brewing Co.*, 96 Mo. 677; *St. Louis v. Seefarer*, 111 Mo. 662; *Ward v. Board*, 135 Mo. 309; *Phillips v. Jones*, 176 Mo. 328. (c) If respondent did condone the appellant's offense of being pregnant at time of marriage by another man unknown to respondent, her subsequent desertion of him revived the offense. An offense which has been condoned may be revived not only by a repetition of the same offense but also by the subsequent commission of other martial offenses. 14 Cyc. Page 643;

Twyman v. Twyman, 27 Mo. 383; Moore v. Moore, 41 Mo. App. 176; Welch v. Welch, 50 Mo. App. 395; Viertel v. Viertel, 123 Mo. App. 63; Dimmitt v. Dimmitt, 167 Mo. App. 94; Herriford v. Herriford, 169 Mo. App. 641; Meek v. Meek, 186 Mo. App. 703; Kennedy v. Kennedy, 182 S. W. 100. (d) In a divorce case it is the province of the appellate court to examine the entire evidence; at the same time deference should be paid to the judgment of the trial court, and it should be made clearly to appear that manifest error has been committed in the conclusion reached, before the judgment will be reversed. King v. King, 42 Mo. App. 454; Nichlōs v. Nichlos, 39 Mo. App. 291; Clark v. Clark, 143 Mo. App. 350; Cox v. Cox, 113 Mo. App. 78. (e) Even if the findings contained in the judgment of themselves would not authorize a divorce, which is by no means admitted, yet there was no error in the judgment if, upon the pleadings and all the evidence in the case, he was entitled to a divorce. Bobb v. Letcher, 30 Mo. App. 43; Griffith v. K. C. M. & C. Co., 46 Mo. App. 544; Jordan v. Buschmeyer, 97 Mo. 94; Reese v. Cook, 17 Mo. App. 517; Kurlbaum v. Roeplse, 27 Mo. 161. (f) The judgment is supported by all the believable evidence in the case and is for the right party. When a witness has intentionally sworn falsely to any material fact in issue, the trier of the facts may disregard any or all of such witnesses testimony. State v. Mix, 15 Mo. 153; State v. Orr, 64 Mo. 339; White v. Maxcy, 64 Mo. 552; Cameron v. Hart, 57 Mo. App. 142; Britton v. City of St. L., 120 Mo. 437; McFadin v. Catron, 120 Mo. 252. (2) Respondent entitled to divorce on grounds of alleged indignities. Her charges of indignities against him not sufficient to amount to recrimination. (a) The fact that a husband has charged his wife with infidelity is not sufficient to authorize a divorce. Mere indignities by a husband to the moral character or reputation of his wife are not sufficient to authorize a

divorce. *Cheathham v. Cheathman*, 10 Mo. 296; *Bethel v. Bethel*, 181 Mo. App. 601. (b) A wife quarreling with and abusing her husband before others amounts to indignities such as would be cause for divorce. *Clark v. Clark*, 143 Mo. App. 350; (c) Where one shows himself legally entitled to a divorce it is the trial court's duty to grant it, and he has no discretion to refuse it. *Miles v. Miles*, 137 Mo. App. 38; *Meyer v. Meyer*, 158 Mo. App. 299; *Wald v. Wald*, 119 Mo. App. 341; *Allfree v. Allfree*, 175 Mo. App. 344. (d) A wife's conduct in seeking to have a public officer compel her husband give her a part of his salary each month, held ground for divorce. *McGee v. McGee*, 161 Mo. App. 40. (3) Respondent entitled to a divorce on the grounds of desertion (a) Though a wife, who believing that a crippled son of her's by a former marriage required her constant care and attention, against her husband's wishes accompanied the son at the time he left the husband's home, and remained absent for a year, the husband was entitled to a divorce on the ground of desertion. *Kaster v. Kaster*, 43 Mo. App. 115. (b) A wife's refusal to accompany her husband to a new home of his choice, within the same country, amounts to a desertion on her part. *Schuman v. Schuman*, 93 Mo. App. 99; *Collett v. Collett*, 170 Mo. App. 590. (c) The agreement of October, 1914, was not an agreement to live separate. But was merely a disposition of property interests, and no bar to a suit for divorce. *Clark v. Clark*, 143 Mo. App. 350; 1 Bishop on Marriage and Divorce, sec. 445; *Lemmert v. Lemmert*, 103 Mo. 57; *Stokes v. Stokes*, 1 Mo. 320; *Rapp v. Rapp*, 162 Mo. App. 673. (4) Letters written by husband to wife are confidential communications and as such not admissible. *Berlin v. Berlin*, 52 Mo. 151; *Dwyer v. Dwyer*, 2 Mo. App. 17; *Carroll v. Carroll*, 68 Mo. App. 190; *Miller v. Miller*, 14 Mo. App. 418; *Ayers v. Ayers*, 28 Mo. App. 97; *Brown v. Brown*, 53 Mo. App. 453; *State v. Bell*, 111 S. W. 24; *Knapp v. Knapp*, 183 S. W. 576.

REYNOLDS, P. J.—Action for divorce by husband, in which a decree was entered in his favor. From this the wife has appealed.

In the original petition, which was filed on August 31, 1916, plaintiff alleged the marriage as of July 23, 1914, and founded his right to a divorce solely upon the charge of desertion, alleging that the wife had absented herself, without a reasonable cause, for the space of one year next before the filing of the petition. Proper jurisdictional averments as to the residence of the parties were made.

It appears that on November 25, 1916, and at the return term, that is, the October, 1916, term of court, defendant filed a motion for alimony *pendente lite* and for an allowance for the support of the child alleged to have been born to the parties since the marriage, which motion was heard by the court on December 2, 1916. We are not advised of the action of the court on this motion, although the proceedings under it, that is the evidence heard on it, appear in the bill of exceptions. On December 6, 1916, and during the September term of the court, plaintiff filed an amended petition in which it is set out that the parties were married in the city of St. Louis on July 23, 1914, and that they had continued to live together as husband and wife from and after that date until the first day of September, 1914. With the usual averments of plaintiff's good conduct as a husband during the period, it is averred that defendant, in disregard of her duties as the wife of plaintiff, had absented herself from plaintiff without a reasonable cause for the space of one whole year of more next proceeding the filing of the original petition and of the amended petition.

As another ground for divorce it is set out "that at the time of the solemnization of the marriage aforesaid, the defendant was pregnant by another man than the plaintiff and at the time of the solemnization of the marriage the plaintiff had no knowledge of said pregnancy."

As a third ground for divorce it is alleged that defendant had offered such indignities to plaintiff as to render his condition intolerable. We do not think it necessary to here set out the indignities charged but will refer to them hereafter.

This amended petition contained the necessary jurisdictional averments as to residence. To this defendant, by way of answer, filed a general denial.

It will serve no useful purpose to set out the evidence in detail which was introduced by the respective parties at the hearing of this case, and we summarize it.

It appears that at the time the motion for alimony *pendente lite* was being heard, there was then living a child, which had been born to defendant December 8, 1914. At that hearing the wife testified that she and the plaintiff had been married by a justice of the peace on March 31, 1914. A certificate of such marriage, signed by the justice, was in evidence, in which it is set out that the parties had been married by him on that date. No license had been issued prior to the date of the alleged marriage, nor was the certificate recorded. The defendant, under cross-examination, and at the hearing of her motion for alimony, testified very positively that she and plaintiff had been married on that date at Clayton by the justice of the peace who issued the certificate, undertaking to describe the justice and the place in the court house at Clayton where she testified the ceremony had been performed. Plaintiff, at the hearing of that motion, had testified that he and defendant were not married until July 23, 1914. The defendant admitted that there had been a marriage on July 23rd, because her mother had insisted that they should be married by a priest and in church.

It appears that a license was duly issued for this marriage and it was solemnized by a priest.

The justice of the peace who had given this certificate, called as a witness by plaintiff in this present action, testified that he had never performed any marriage ceremony between plaintiff and defendant and

that in point of fact he had never seen the plaintiff until he saw her in court when testifying in this case; that in the last of July or first of August, 1914, plaintiff came into his office, as he had been in the habit of doing almost daily, and always before then smiling. The justice asked him what was the matter (evidently meaning that plaintiff did not then look happy), and plaintiff said, "I don't know." Then the justice said, "You ought to be a happy man now that you are a married man," and plaintiff said, "I am, in a way." Plaintiff then went out of the justice's office but came back a few hours later and asked the justice if he would do him a favor. As they had "always been the best of friends," said the justice, he told plaintiff that if there was anything he could do for him he would, whereupon plaintiff said, "My wife is in the family way and it is not my fault but I am afraid of her father and I am afraid of her brothers and I am afraid of my mother-in-law," and the justice asked him why he was afraid, to which plaintiff said, "Why they know she is in that condtion." Counsel for defendant objected to all this but said he would let it in if the court wanted to hear it but he afterwards moved that it be stricken out, whereupon the court ruled that "the last answer will be stricken out." The record is in such shape that it is impossible to say what was stricken out, so we give all of it.

Plaintiff's version of obtaining the false certificate from the justice is, that he had obtained it because defendant and her mother had begged him to save the girl's character and to get this certificate, and that he did not know that his wife was pregnant until the doctor told him of it on this visit which, as stated, occurred two or three days after the marriage in July. Plaintiff and his wife and her mother went to see this doctor and the doctor said to them, "Do you know the condition of this woman," to which plaintiff said he did not. The doctor asked him how long he had been married and he said, "Just a very short time," and the doctor then told him that his wife was pregnant and had been so for

some four and a half months and "had a very severe discharge". According to plaintiff, after they went home, he asked his wife who had caused her to be in that condition, and she began to cry and gave him no answer at all but said "'You can protect me, you are the only one, you can,' and then asked me to get a phony marriage license." This is denied by the wife.

At the trial of this action for divorce, and after the justice had testified as above, the defendant admitted that she had sworn falsely on the previous occasion, but stated that she had done so at the instigation of her husband who had brought the certificate purporting to show a marriage on March 31, 1914 by the justice, and after it was known that she was pregnant, to show to her friends and to show to her father that he (plaintiff) had married her at that time, because otherwise her father would kill him; that her father and brother could have him prosecuted; that her husband brought this certificate to her and told her that she should stand by it and should always say to her father and mother that they had been married in March and if she told it different her brother and father could handle him very severely. Defendant testified that in point of fact they had not been married until July 23, 1914, when they were married in church. According to defendant's testimony, her husband knew of her condition before they were married; that she told him there was "something the matter with her." After they were married, she still complaining of being sick, at the instigation of her husband, she, with her husband, went to see a physician selected by the husband, about July 29, 1917. The physician, after examining her, told her husband and defendant's mother, who appears to have been with them, that she was pregnant, but otherwise in no more serious condition than a woman would be under such circumstances, although she had a slight discharge, but nothing unusual. The plaintiff further testified that after the visit to the physician, and under that physician's advice, although they were living together, he had had no connection

with his wife for sometime after this marriage in July. They lived together after this marriage at a home provided and then owned by the husband until September 21, 1914, when plaintiff testifies defendant deserted him. But as we understand the testimony, plaintiff himself left the home and from that time on the parties have lived separate. Plaintiff assigned as the principal reasons for leaving home, as he testified, the fact that his wife insisted on having her father and mother and two brothers live with them in his house, to which, after the marriage, he had himself removed them, and that while they were together his wife had applied abusive epithets to him, had pouted because he objected to her father and mother and brothers living with them, had refused to remove from that place to another residence that he was willing to provide, where they could live alone, and had complained of his not making pecuniary provision for her and had insisted that he apply moneys of his father, which were in his hands from collections made for his father, and had practically turned him out of the house, which was his own property at the time and which he allowed the father and mother and brothers the use of rent free, he paying \$7 a week for board. These are, in the main, the indignities relied upon by the husband.

As proof of desertion, it was in evidence that after the husband left the home he wrote two letters to his wife, one of date September 14th, the other of date September 18, 1914, in the former of which he expressed his sorrow for the misunderstanding between them and his regret that both had such bad tempers that they could not agree with anyone, and stating that he had a nice small house lined up and that if his wife would agree to come and live with him as a loving husband and she as a loving wife they could get along nicely and no one would know anything about their troubles; that he was sorry they had both gone so far as to consider being married and to live together until death but that his wife knew that it was as hard on him as it was on her and that if they could get together in a way, they ought to; that if his

wife could see the matter in the way he did, and if they were alone, they could save some money and she could be able to get what ever was needed, but in the present condition, he was broke, adding that he hoped she would consider the matter deeply and do what she thought best for herself because he would take the best care of her, as she knew that her folks could not be with her all her life. The letter of September 18th was along similar lines. The wife does not appear to have answered either letter. Her neglect to do so or to resume habitation with her husband is the foundation for the charge of desertion, which, at this trial, plaintiff testifies occurred about September 21, 1914.

As against this, it appears that on October 5, 1914, the day that defendant became seventeen years of age, she, with her husband, signed an agreement, which was acknowledged October 7, 1914. Defendant testified that she had been asked to sign this two weeks before but when it was found that she was not then of age this paper had been brought back on October 5th, the day that she become of age, on which day she signed it.

This agreement sets out that "whereas the said parties (that is plaintiff and defendant) have separated and feel satisfied that they cannot live together as husband and wife and with a view to settle their property rights and for the purpose of providing for the support and maintenance of the said Finnette Tegethoff, the said Leo Tegethoff has this day joined in the conveyance of their real estate which is owned and held jointly by them, for the purpose of her support and maintenance, that the said Finnette is to have and to hold said real estate and to dispose of same as she sees fit, that in consideration of the conveyance of the said real estate by the said Leo Tegethoff the said Finnette Tegethoff agrees to release Leo Tegethoff from any further support and maintenance of herself and heirs born of their marriage." Both parties signed and acknowledged this.

It should be said that the two letters above referred to, of date September 14th and September 18, 1914, when offered by defendant's counsel, were objected to

by counsel for plaintiff, on the ground that they were privileged communications, but it further appears that afterwards and apparently by consent, the letters were admitted and read in evidence.

It seems, although this is not very clear, that this agreement above set out, acknowledged October 7, 1914, was entered into about the time that the wife was proposing to have her husband prosecuted for abandonment and failure to support herself and child, and on the signing of this agreement that proceeding was abandoned. It is in evidence that this property conveyed was supposed to be worth \$5200 but was subject to a deed of trust for \$2600 and the property was subsequently sold out under it, and the wife testified that she had received for her equity in it, after the payment of costs, taxes, etc., \$400.

The plaintiff testified very positively that he had had no improper relations with his wife prior to the marriage and even for some time after the marriage, and in consequence of the advice which the doctor gave him in July, 1914, had had no conjugal relations with her for sometime thereafter. On her part, however, the wife testified very positively and in some detail as to having allowed plaintiff to have intercourse with her, first, in March, 1914, and two or three times afterwards in her own home, she testifying that she had yielded to the solicitations and force of the plaintiff and that these occurrences took place after they had become engaged. It was in evidence that the parties had become acquainted with each other, the defendant then about sixteen years of age and the plaintiff about twenty-four, at a social party in December, 1913, and that plaintiff had been very assiduous in his attentions. According to the testimony of defendant and of her mother and of acquaintances, it does not appear that defendant associated with any other man or men, beyond the fact of meeting them at parties and dances and one or two occasions being accompanied home by young men whom she met on these occasions. The testimony tends very strong to show that plaintiff was the only male escort or visitor that the defendant had

from the time they became acquainted until they were married. There is not a particle of testimony in the case even tending to show that during that period defendant was in receipt of the attention of any other man, and no pretense that any man other than plaintiff was in the habit of visiting her at her home. They were recognized as sweethearts by all of their friends. Plaintiff produced no evidence to the contrary. It is true that a couple of photographs appear to have been introduced by plaintiff in which defendant and others were shown in groups. They are not before us but defendant explained that these were group pictures taken when she and others were at dances or parties. That they placed defendant in a compromising or unladylike attitude, is not pretended.

It is further to be said that while defendant testified that after the marriage and until the separation, plaintiff was in the habit of indulging in drink to excess every Sunday, at all other times he appears to have been a sober and well conducted young man, in fact many witnesses testified to his good character. The mother of the defendant, testifying that she discovered after the marriage that plaintiff was addicted to the excessive use of drugs, testified that she was a police matron and had experience with people who were addicted to the drug habit and that she had no hesitation in saying that plaintiff was not a drunkard but a cocaine fiend. In this, however, she is not corroborated by any other witness. It is further to be said that the testimony of all the witnesses called, and there were a number in behalf of defendant, testified to her fine character and her exemplary conduct as a woman and as a wife.

The plaintiff on his part denied any illicit intercourse with defendant prior to the marriage and denied that he was aware of her condition until informed of it by the physician. On her part defendant testified in the most positive manner that she had never had any improper relations with any man except with plaintiff, and admitted illicit intercourse with him after they became engaged and before their marriage, and testified that plaintiff was aware of her condition when he married her.

This is rather a meager, but we think sufficient statement of the salient facts in the case.

The learned trial judge, as appears from the record, granted the decree to plaintiff because of the false testimony given by the wife at the hearing of the motion for suit money, and hence he rejected all of her testimony, and rejected all the testimony of defendant's mother and that of a younger brother of defendant as to events which the latter said had occurred when he (the brother) was seven years old, he testifying to them two years afterwards. In brief, the learned trial judge accepted the testimony of plaintiff in the case and rejected all of that given by defendant and her mother and brother and granted the decree.

We have said, as has our Supreme Court, in a multitude of cases, that great deference is to be paid to the finding of the trial judge when sitting in a case of this kind, that judge having the advantage of seeing and hearing the witnesses who testified; but with all that, our system of practice, while it permits us to have before us only the testimony as taken down and reported and brought before us, does not absolve us from the duty of examining and weighing that testimony and arriving at our own conclusion upon it. We have read all the testimony in this rather disagreeable case with great care, and while making all allowance possible in favor of the superior opportunities of the trial judge, are compelled to hold that his finding is erroneous.

Taking up the charge of desertion, the evidence persuades us that desertion, if we may so call it, that is severing of relations between husband and wife, was by the act of the husband himself. It is true that two or three days after he had left the home he wrote the letters referred to, asking his wife to return to him and offering to provide her a home. Ordinarily it became the duty of the wife to follow the husband and to become reconciled to him and resume conjugal relations thereafter. The wife undoubtedly failed in this, but after that, as appears by the agreement, which is in evidence and which we use for the sole purpose of pass-

ing on this point, and without in any manner whatever passing on the validity in law of that agreement, use it as furnishing evidence that the separation between the parties was by mutual consent, and that this occurred after the letters written by the husband to the wife. So we do not think that on the alleged ground of desertion this act is maintainable.

The so-called indignities, in our judgment, are not sufficient to afford a statutory ground for divorce.

There remains for consideration the most serious charge in the amended petition.

Our statute, section 2370, Revised Statutes 1909, in enumerating the causes upon which a divorce may be granted, provides as one of the causes, "Where the intended wife, at the time of contracting marriage, or at the time of the solemnization thereof, shall have been pregnant by any other man than her intended husband, and without his knowledge at the time of such solemnization." It is very remarkable that if the husband, plaintiff here, was honestly of the belief that he was not the father of the child born after the marriage between himself and defendant, that when he filed his original petition in this case he based it solely on the ground of desertion. He filed that petition on August 31, 1916, and yet, according to his own testimony, he knew in July, 1914, of the unchastity of his wife. In his testimony as to all that took place between them afterwards, and taking his own version of the matter, and particularly having in mind the two letters written by him in September, 1914, it is very significant that he in no manner whatever refers to the premarital misconduct of his wife. Taking his own version of what occurred when the doctor informed the parties not only of the pregnancy of his wife, but of the fact that that appeared to have been her condition going on four and a half or five months, we find no expression of indignation, sorrow, or reproach. He does testify that he endeavored to have his wife confess to him who was the author of her condition, and he says that when he did that she cried, and that when she asked him to

obtain the certificate from the justice as a matter of honesty and fairness to her, that she told him he owed it to her. To the contrary, when his mother-in-law first learned of her daughter's condition from the physician, about the 29th of July, 1914, the plaintiff, a few days afterwards, went to his friend, the justice, to procure a predated marriage certificate, as he then told the justice, because he was afraid of his wife's father, and of her brothers, and of his mother-in-law, because they knew his wife was pregnant. Nor was it until the filing of the amended petition in this case on December 6, 1916, two years and seven months and about eight days, according to his own testimony, after he learned of his wife's pregnancy, that he put on record any complaint of this matter. Nor does it appear that when he applied to his friend, the justice of the peace, for an antedated marriage certificate, that he made the slightest complaint or reflection on his wife, beyond saying that "it was not his fault." What was not his fault, is not clear. He further gave as a reason for wanting that certificate his desire to cover his wife's shame and protect his own good name. In short, in the face of the positive testimony of the defendant as to her intercourse with the plaintiff, and in the absence of the slightest probative testimony that in any way pretends to show her association with any other man, and in the light of the conduct of the plaintiff himself, we cannot, on this record, believe that within the terms of our statute, section 2370, *supra*, at the time of the contracting of the marriage and at the time of the solemnization thereof, the plaintiff here was without knowledge of the act and consequent condition of his wife.

From a very careful consideration of all the testimony in this case, our conviction is that the plaintiff here is not entitled to the decree on any of the grounds alleged.

The judgment of the circuit court is reversed and the cause remanded, with directions to that court to dismiss plaintiff's action. , *Allen and Becker, JJ.*, concur.

**FRANK E. PAVLICK, Appellant, v. SUPREME
LODGE KNIGHTS OF PYTHIAS, a corporation,
Respondent.**

**St. Louis Court of Appeals. Submitted on Briefs November 6, 1917.
Opinion Filed December 4, 1917.**

1. **INSURANCE: Fraternal Benefit Insurance: Forfeiture of Membership by Nonpayment of Assessment.** Where the by-laws of a fraternal order provided that failure to make payment of a monthly assessment, due on the first of each month, before the 20th, should cause forfeiture of the certificate of membership, and membership thereby cease, *ipso facto*, and that membership could be regained only as provided, and a member of the order then surviving failed to pay such assessment, and neglected to apply for reinstatement as required, all he could recover from the order were the amounts paid in by him pending consideration of his reinstatement, for, though the law does not favor forfeitures, when the parties make a specific contract for the doing or not doing of a certain thing, and fail, the courts are bound to enforce the contract as made, unless the party insisting upon forfeiture has waived it or is estopped.
2. ———: ———: **Forfeiture for Nonpayment of Premiums: Waiver.** Defendant fraternal order did not, finally and beyond possibility of later insisting upon prompt payment under penalty of forfeiture, waive the portion of its by-laws requiring payment of premium before the 20th of each month by accepting premiums after a much later date from time to time during the life of the policy sued on, up to its final insistence upon forfeiture, where, after the association had notice that the member appeared to be in default, it not only gave him opportunity to apply for reinstatement, and assured him he would be reinstated, but urged him to apply, and although accepting payment of assessments after due, it had a right, the member alive, on due notice to him, to refuse to grant like indulgencies in the future.
3. ———: ———: **By-Laws Construed Together.** By-laws of a fraternal benefit order are to be read and construed together.
4. ———: ———: **Waiver of Requirement of Payment of Premium: Question for Court.** Where the facts as to whether defendant fraternal order had waived its requirement of the payment of premiums before the 20th of each month were undisputed, it was for the court to say whether plaintiff member had made a case warranting him in recovering his entire payments, the order having declared a forfeiture and dropped him from membership.

Appeal from the Circuit Court of the City of St. Louis.
—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

C. J. Anderson, for appellant.

(1) Plaintiff was entitled to recover the full amount paid by him as premiums on this policy, being \$266.75, together with interest thereon from the time of each such payment to date. *Suess v. Life Insurance Co.*, 64 Mo. App. 1; *Slater v. Supreme Lodge, K. & L. of H.*, 78 Mo. App. 387; *Puschman v. Hartford Life & Annuity Insurance Co.*, 92 Mo. App. 640. (2) Defendant had waived that portion of the by-laws requiring payment of premiums before the 20th of each month, by accepting such premiums from time to time at a much later date during the entire life of the policy sued on. *Keys v. The National Council K. & L. of S.*; 174 Mo. App. 671; *McMahon v. Maccabees*, 151 Mo. 522. (3) Ben Dalzell, who collected the premiums from the plaintiff, was the superintendent of the defendant of the company for the State of Missouri. He was neither the agent for the plaintiff nor was he the agent for the local lodge to which plaintiff belonged. He was the agent for and the state superintendent of the insurance company, and his waiver of prompt payment by plaintiff extending over a period of several years, was binding upon the defendant company. *McMahon v. Maccabees*, *supra*; *James v. Life Association*, 148 Mo. 1; *Boward v. Bankers' Union*, 94 Mo. App. 442. (4) Defendant claims that plaintiff's insurance was forfeited on account of his failure to pay the premium for the month of March before the 20th of said month. Plaintiff paid the premium for the months of March and April on April 17th. Under section 503 of defendant's by-law this payment should set aside such forfeiture without any further action whatsoever on the part of the plaintiff. (5) Whether defendant had waived its requirement of the payment of plaintiff's premium before the 20th of each month was a disputed question of fact which

should have been decided by the jury, and was not a question of law to be decided by the court. There was a direct conflict of testimony on this point. *Keys v. National Council*, 174 Mo. App. 671; *Stranchon v. Metropolitan Street Railway Co.*, 232 Mo. 587; *Crossett v. Ferrill*, 209 Mo. 704; *Meily v. Railroad*, 215 Mo. 567.

R. P. & C. B. Williams for respondent.

(1) The certificate was forfeited by failure of plaintiff to make payment for the month of March, 1912, within the time provided for in the contract and by-laws of the society. *Boyce v. Royal Circle*, 99 Mo. App. 349-355; *Harvey v. Grand Lodge*, 50 Mo. App. 477; *Chadwick v. Triple Alliance*, 56 Mo. App. 463; *Lavin v. Grand Lodge*, 104 Mo. App. 1; *Borgraeft v. Supreme Lodge*, 22 Mo. App. 127; *Day v. Woodmen Circle*, 174 Mo. App. 260-269; *Pauley v. Modern Woodmen*, 113 Mo. App. 473. (2) There was no waiver of the provision of the by-laws for prompt payment of the monthly rates. Proof that the local secretary indulged the member at times by remitting the amount to the head office and later collected from the member did not tend to fix any right in the member to pay at any time other than that fixed by the contract; nor would the practice of accepting the payment, after suspension, by the local officer, have this effect, unless the head office had knowledge of the practice. *Lavin v. Grand Lodge*, 104 Mo. App. 1-19; *Boyce v. Royal Circle*, 99 Mo. App. 349; *Marchall v. Grand Lodge*, 133 Calif. 686. (3) The contract in this case expressly provides that no subordinate officer has any right or power by any statement, agreement, promise or manner of transacting business to waive the provisions or requirements of the contract, or the laws rules and regulations of the defendant. This provision of this contract is binding on the defendant, and put it without the power of any subordinate officer to waive any requirement of the contract. *Brittenham v. W. O. W.*, 18 Mo. App. 523-534; *Day v. Supreme Council*, 174 Mo. App. 260; *Lavin v. Grand Lodge*, 112 Mo. App. 1; *Clair v. Royal Arcanum*, 172 Mo. App. 709;

Session Acts 1911, page 292, sec. 22; *Knade v. M. W. A.*, 171 Mo. App. 377-383. (4) Section 502 of the by-laws of defendant provided that failure to make payment on or before the 20th day of each month shall cause, from and after such date, a forfeiture of the certificate of membership and all rights thereunder; section 512 of the by-laws of defendant provides that this provision of the by-law cannot be waived by a subordinate officer, and specially provides receiving the money after the suspension is not a waiver. These laws are binding on the plaintiff. Session Acts 1911, p. 292, sec. 22; *Hartman v. Knights & Ladies*, 190 Mo. App. 92; *Thompson v. M. B. A.*, 189 Mo. App. 15-18. (5) A member of a fraternal society who has been suspended can be reinstated only in strict conformity with the by-laws, rules and regulations at the time of reinstatement, and has no rights until an actual reinstatement has taken place. *Edgerly v. Ladies, etc.*, 151 N. W. 692 (Mich); *McLaughlin v. Supreme Council*, 68 N. E. 344 (Mass); *Odd Fellows v. Ivy*, 62 So. 423 (Miss.); *Munhak v. Grand Lodge*, 133 Calif. 686. *Adacs v. Grand Lodge*, 66 Neb. 389.

REYNOLDS, P. J.—Plaintiff instituted this action against the defendant before a justice of the peace, filing a statement, in which he sets out that the defendant is an insurance company authorized to do business in this State, and that he became a member and took out a policy in the insurance department of the defendant in June, 1897, at the rate of one dollar a month, paying thereon at that rate and at a rate which from time to time was increased until June 1, 1908, when his premium was placed at \$1.95 a month, he continuing to pay, as he avers in his statement, until July 12, 1912. He avers that after the month of July, 1912, he tendered the sum of \$1.95 per month to the defendant from time to time, which it refused to accept. Averring that during all the times stated he had complied with all the terms, conditions and requirements of the insurance contract, and that the defendant, without just

cause or any cause, had cancelled his policy of insurance, thereby depriving plaintiff of the benefits thereof, and that during the time of the issuance of the policy in 1897 and until July 12, 1912, he had paid a total of \$276.75, plaintiff prayed for judgment for that amount, with interest from the date of each of the payments, at the rate of 6 per cent per annum and for his costs.

There was no pleading by defendant.

Judgment going against plaintiff in the justice's court, he appealed to the circuit court, where the cause was tried before the court and a jury. The jury returned a verdict in favor of plaintiff in the sum of \$9.75, the amount which the court instructed the jury plaintiff was entitled to recover. Judgment being entered in favor of plaintiff for that amount, he filed a motion for a new trial which was overruled and, saving exception, he has duly appealed to our court.

At the trial of the cause plaintiff changed the statement of the amount he had paid from \$276.75 to \$266.75.

There was evidence to the effect that the policy had been cancelled by defendant for plaintiff's failure to pay the assessment due March 1, 1912, but payable March 20th, and that plaintiff, insisting that the forfeiture had been made unlawfully, although requested by defendant to apply for reinstatement, failed to make application. Pending the controversy between plaintiff and defendant as to whether this forfeiture was legal, plaintiff had paid to defendant the \$9.75, which defendant, at the trial before the justice and again at the trial in the circuit court, had tendered plaintiff, and it is for this amount that the court directed the jury to find a verdict in favor of plaintiff.

It appears that plaintiff not having paid the March assessment of \$1.95, which should have been paid on or before the 20th of that month, gave a check to the order of B. W. Dalzell, of date April 17, 1912, for \$3.90, intending that to be applied as payment for the assessments of March and April, 1912. While this check was dated April 17th, it was not delivered to the payee un-

til April 20, 1912. It was indorsed by the payee and, passing through various banks in St. Louis, was finally paid by plaintiff. It further appears that on two or three, or possibly more, occasions prior to this, plaintiff had not paid the assessment in the month in which it fell due but had given checks to Dalzell, payable to the order of Dalzell, in the second month and within the time required for the payment of the assessment for the second month. It was in evidence that Mr. Dalzell was secretary of what is known as section 33 of the Order, to which section plaintiff belonged, and was also in the employ of the Supreme Lodge of the Order as State Superintendent of the defendant for Missouri. What his powers and duties were as superintendent, nowhere appears. It also appears that under an arrangement between Mr. Dalzell and plaintiff, Dalzell, on several occasions, had personally advanced the money due for the monthly assessment against Pavlick, sending it on to the officers of the Supreme Lodge as if paid in due time by plaintiff, and in this way taking care of plaintiff's payments, so that as far as the Supreme Lodge was concerned, plaintiff did not appear to be in default, nor does it appear that Dalzell had ever reported to the Supreme Lodge that he (Dalzell) was making these advances, he sending the money on within the time it was due as if then paid by plaintiff. Dalzell, as before noted, did this on several occasions, but it happened that when this March assessment fell due, Mr. Dalzell being absent from his office and from the city of St. Louis, his clerk, who was then in charge of his office, in due course, and about March 31, 1912, reported plaintiff to the Supreme Lodge as in default for the March assessment. No action appears to have been then taken by the Supreme Lodge, but under section 502 of the laws of the Order, to be hereinafter set out, plaintiff became automatically suspended and would have to apply for reinstatement. Afterwards, and on April 20, 1912, plaintiff having then paid \$3.90 for the assessment due in March and for that due in April, and acting under section 512 of the Order, to

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be hereinafter set out, Dalzell, as secretary but by his clerk issued this receipt:

“Insurance Department, Knights of Pythias,
St. Louis, Mo., April 20, 1912.

Received of F. A. Pavlick, Three 90/100 Dollars.
This receipt is given subject to the action of the Board of Control, Insurance Department, Knights of Pythias, on application for cancellation of forfeiture now pending. The amount herein stated will be returned if said applicaton is not accepted.

BEN W. DALZELL, Secretary.

L. BISCHOFF.”

It would seem from this that the fact that plaintiff had been reported to the Supreme Lodge as in default in payment of the March assessment, was overlooked by Mr. Dalzell's office when this receipt was given. Being then advised of plaintiff's default in payment of the March assessment, and under date of April 23, 1912, the president of defendant wrote to plaintiff to the effect that he regretted to advise him that they had failed to receive his payment for the month of March, and that he inclosed “herewith a blank application for reinstatement or cancellation of forfeiture,” which plaintiff was requested to fill out, sign and return with his payment for the month of March in an inclosed stamped envelope and upon receipt of same he would be reinstated as a member of the insurance department in good standing, the rest of the letter calling attention to the strong features of the defendant organization as providing insurance for the protection of the beneficiaries of members. The letter concludes with the statement that the president, speaking for the Supreme Lodge, cannot believe that plaintiff “desires to sever his membership in the Order at this time.” In this first blank application for reinstatement sent, which is not in evidence in full, it does not appear that a medical examination was required. Plaintiff, however, failed to pay any attention to the letter or to forward any application for reinstatement. In May and again in June, 1912, Mr. Dalzell took an application blank similar to that which had been inclosed to plaintiff and

which he had been requested to sign, to plaintiff's place of business and asked him to sign it and attempted to explain what it meant to him, but plaintiff would not listen to any explanation, would not read the application himself, and declined to allow the secretary to read it to him. The secretary testified that as far as he knew plaintiff had never been asked to submit to a medical examination and that in urging plaintiff to sign the application for reinstatement, he told plaintiff it was a mere matter of form; that if the application was made within a certain time no medical examination was required but after that one was required. The secretary sending on money which had been paid him by plaintiff after he had forfeited his membership, as it was claimed, the officers of the Supreme Lodge refused to receive it and returned it to the secretary.

The secretary, Mr. Dalzell, testified that when plaintiff had been in default previously he (the secretary) had paid his assessments personally and when plaintiff gave him a check for the amount of two assessments, if that was the number he owed, he (Dalzell) had deducted from the proceeds of the check the money that was coming to him and forwarded the amount due for the month to the Supreme Lodge, not advising it of the fact that plaintiff had not himself paid it or that he had been in default and that he was advancing this money for him. He stated that if he had been at home when the March payment fell due he would have sent it on himself, as he had done before, and trusted to plaintiff to repay him, which before then plaintiff had always done.

One of the laws governing the insurance department of the Order in force at the time, No. 503, provides that the Board of Directors of the Society shall have power at any time during the calendar month in which any benefit certificate has been forfeited for non-payment of the regular monthly payment or assessment, "or at any time during the calendar month immediately succeeding the month in which such forfeiture has occurred, to cancel such forfeiture and to re-admit the former member and renew and restore his former con-

tract upon payment of all arrearages. If any such forfeiture shall have occurred and continued to exist until the first day of the second calendar month succeeding the month in which such forfeiture has occurred, the Board of Control shall have the power, within the next thirty days after the lapse of said time, to cancel such forfeiture and to re-admit such former member and renew and restore his former contract upon the payment of all arrearages, upon its being made to appear to the satisfaction of the Board that such member is in good mental and physical health."

It was under this law that the blank application for reinstatement was sent to plaintiff in April, 1912, and under the power conferred by this section that the Board offered to reinstate plaintiff upon his making application and without requiring a medical examination. If plaintiff had applied in April, or within the month succeeding the forfeiture, a medical examination would not have been required. Failing to apply in April, or the succeeding month, the Order offered to reinstate him if he accompanied his application with a medical certificate. In fact, the president not only offered to reinstate plaintiff in April, but urged him to apply for reinstatement.

Section 502 of the laws of the Order, read in evidence, provides, in part:

"Forfeiture of Membership.—The regular monthly payments and assessments of all members of the Insurance Department shall be due and payable to their respective Section Secretaries without notice in advance, on the first day of each and every month, and the failure to make such payment on or before the 20th day of each month shall cause from and after such date a forfeiture of the certificate of membership and all right, title and interest such member or his beneficiaries may have in and to the same, and membership shall thereby cease *ipso facto* . . .

"In case of forfeiture under the above section, membership may be regained only in the manner provided by law."

Section 512, also read in evidence, provides:

"The receipt and retention of payments and assessments from members by the Insurance Department shall not constitute a waiver of any law of the Supreme Lodge or defense which might be relied on had such payments not been received and retained. No course of dealing between members and officers, whether persisted in for a long or short time, shall waive this provision or the effect of same; all of said laws enacted by the Supreme Lodge, having been enacted by it on its representative and legislative capacity only, in which every member is a party, are intended to bind all members at all times."

On these facts we find no error in the action of the trial court in instructing the jury that all the plaintiff could recover were the amounts he had paid in pending the consideration of his reinstatement and that amount was correctly stated in the direction which the court gave to the jury and as found by the jury.

It is true that the law does not favor forfeitures but when parties make specific contracts for the doing or non-doing of a certain thing and fail, then the courts are bound to enforce the contract as made by the parties themselves, unless the party insisting on a forfeiture has waived it or is estopped by his own acts. [McMahon v. Supreme Tent Knights of Maccabees, 151 Mo. 522, 52 S. W. 384; Oldham v. Modern Brotherhood of America, 170 Mo. App. 564, 1. c. 568, 157 S. W. 92.]

It is claimed by learned counsel for appellant that defendant had waived that portion of the by-laws requiring the payment of premiums before the 20th of each month by accepting such premiums from time to time after a much later date during the entire life of the policy sued on. McMahon v. Supreme Tent Knights of Maccabees, *supra*, and Keys v. Knights and Ladies of Security, 174 Mo. App. 671, 161 S. W. 345, are cited in support of that proposition. Undoubtedly, these cases state the law but on their facts they do not apply to the case at bar.

In Griffith v. Supreme Council of the Royal Arcanum, 182 Mo. App. 644, 1. c. 657, 166 S. W. 324, there was an

arbitrary forfeiture of plaintiff's membership or of his rights without notice to him and an opportunity being given him to pay up back assessments, and we there held a forfeiture would not be sustained. It was there held that because of such arbitrary action, the forfeiture would not stand. But we have no such case here. Here it is in evidence that after the governing body of the Order had notice that plaintiff appeared to be in default in the making of the payment due in March, it not only gave plaintiff an opportunity to apply for reinstatement, and assured him that he would, on application, be reinstated, but urged him to apply.

The cases cited were cases in which, after the death of the member, the Order had attempted to enforce a forfeiture in the face of acts by its officers which amounted, in law, to a waiver of strict compliance with the laws of the Order. As said in the Oldham Case, *supra* (l. c. 569), an Order such as this "will not be allowed to suddenly turn upon deceased in his last sickness and demand a forfeiture on account of the same conduct it had customarily forgiven and overlooked."

It is further claimed by learned counsel for appellant that under section 503 of defendant's by-laws, it was the duty of defendant to reinstate plaintiff's policy on April 20th, when plaintiff paid all arrearages; these arrearages having been paid during the calendar month next following the month in which the forfeiture occurred. We have set out that section and do not find that this contention receives any support under it. It is to be read in connection with section 502.

It is finally urged by learned counsel for appellant that whether defendant had waived its requirements of the payment of plaintiff's premium before the 20th of each month, was a disputed question of fact, which should have been decided by the jury and was not a question of law to be decided by the court, there being, as that counsel claims, a direct conflict of testimony on this point. But that same counsel, in his printed argument filed with us, stating the facts practically as we have done, says that the evidence as to the facts is undisputed. On those facts,

it was for the court to say whether plaintiff had made out a case warranting him in a recovery of the amount he claimed. The court very correctly held that on the case made, as a matter of law, plaintiff could only recover a part of it and so instructed the jury. We see no error in this.

To repeat, and in conclusion, the defendant Order gave plaintiff, living, every opportunity to be reinstated. Admit that by its course of dealing with plaintiff it had waived the prompt payment of assessments in several months, surely it cannot be that it must continue in that practice indefinitely. It surely has the right to discontinue doing so on notice to a member, that it will thereafter stand on the letter of its law, which, as in an Order such as this defendant, plaintiff with his fellow members has assisted in making. If it then gives a member reasonable notice and an opportunity to become reinstated, as this defendant did, and if, as here, the member refuses to accept and avail himself of the offer, he cannot complain if the defendant insists on its right to declare a forfeiture. The judgment of the circuit court is affirmed. *Allen and Becker, JJ.*, concur.

EDWIN S. YEOMANS v. MINNIE NACHMAN, Appellant, MUTUAL ICE FUEL & STORAGE CO., a Corporation, Respondent.

Kansas City Court of Appeals, December 3, 1917.

1. **EQUITY: Mortgages and Deeds of Trust: Duplicate Notes: Note First Negotiated the Valid Lien.** An Ice Company, owner of a tract of land placed the title in a straw man so that he might mortgage it for the Ice Company without complicating the matter with the Ice Company's other business. The matter of mortgaging the land was entrusted to one C who was in the investment business but who was also Secretary and Treasurer of the Ice Company. With-

out the knowledge of the Company, C. procured the execution of duplicate notes, and negotiated one to plaintiff and some two years or more later and after interest thereon had become past due according to its terms, negotiated the duplicate to defendant N. *Held*, that the note first negotiated was the valid note, and that the purchaser of the other obtained no lien.

2. ———: ———: ———: ———: **Right of Innocent Purchaser of Fraudulent Duplicate to Compel its Payment on the Ground of Landowner's Negligence.** Defendant N. bought the note of C. who sold it to her in behalf of his investment company and not as agent of the Ice Company. The latter knew nothing of the fraud and if it was negligent in trusting the matter to C. defendant N. was equally or more negligent. Besides, the fraud perpetrated on N. was committed long after the agency for the Ice Company had been completed; hence, N. is not entitled to compel the Ice Company to make good her loss, nor is the said company estopped to deny liability.
3. ———: ———: **Bills and Notes: Innocent Purchaser: Past Due Interest Coupons.** A purchaser of a note having attached thereto interest coupons that are unpaid and past due, and which provides that if interest is not paid when due then the whole note may become due, and which does, not conform to description in deed of trust by which it purports to be secured is chargeable with notice of its infirmities.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*,
Judge.

AFFIRMED.

Piatt & Marks for appellant.

Hadley, Cooper, Neel & Wright for respondent.

TRIMBLE, J.—The suit, out of which the controversy now before us has evolved, arose because of the fact that plaintiff Yeomans and defendant Nachman each owned and held a Real Estate Mortgage Bond, or note, similar in date, amount and terms, and stating therein that it is secured by a first deed of trust, of even date. There is but one such deed of trust, and only one note described in and secured thereby; and as both of the above-named parties claimed the security, it became vitally necessary to ascertain which was

entitled thereto. Plaintiff Yeomans, therefore, brought an action in equity to have his note adjudged to be the one secured by said deed of trust and himself declared to be the assignee, owner and holder of the note described therein, with power to foreclose the same in case of default. Minnie Nachman, as the claimant and holder of the other note, and the Mutual Ice, Fuel and Storage Company, as the owner of the real estate on which the deed of trust was given, were made parties defendant. In addition to the above-mentioned relief sought, the petition prayed that said Nachman's claim to any right or interest in the deed of trust be held for naught and that she be restrained from asserting, as against the plaintiff, any such right or interest or any lien upon said real estate, and that the Ice Company be given full protection in paying to plaintiff the interest and principal of said note so held and owned by him.

The two notes or bonds, each dated January 15, 1912, were for \$2000, payable to the order of the J. S. Chick Investment Company, due five years after date and signed by C. B. Wescott. They bore six per cent interest payable semi-annually evidenced by coupon notes attached.

The defendant Ice Company, in its answer to the petition, admitted that it owned the real estate mentioned and that said real estate was subject to said deed of trust, but denied all other allegations.

In her answer to the petition, the defendant Minnie Nachman asserted that she was the owner of the note described in and secured by said deed of trust, and was entitled to its security; that, if plaintiff held such a note as he claimed, it was a duplicate of the one she held, and was fraudulently issued by Wescott; and the plaintiff's rights were inferior to hers.

She further set up that at the time Wescott executed the deed of trust he was the holder of the legal title to the real estate described therein, but that the same was really owned by the Ice Company who had caused the said real estate to be conveyed to him for

the purpose of executing the said deed of trust, and, after this was done, put the title back into its real owner the Ice Company, he neither paying nor receiving anything of value at the time of the conveyances to and from him; that if duplicate notes were issued by Wescott, then, since the Ice Company knew he was insolvent, and since the real estate was conveyed to and held by him for the purpose of executing said deed of trust and after that was conveyed without consideration back to the Ice Company, the latter should be required to pay both notes, and the real estate should be charged with the lien of both; that in equity and good conscience this is what should be required because the Ice Company, either through connivance with Wescott or through its own carelessness and negligence, put it within the power of, and created the opportunity for, said Wescott to perpetrate such fraud. Wherefore, defendant Minnie Nachman prayed that she be adjudged to be the owner and holder of the true note secured by said deed of trust and entitled to the benefit and security thereof; that the court inquire fully into and determine the facts, and, if it be found that duplicate notes were executed, then that the Ice Company be adjudged liable in equity for the payment of both of them, and that the real estate described in said deed of trust be charged with the payment of both.

To this answer and cross petition on the part of defendant Nachman, the Ice Company filed an appropriate reply and answer, in which the allegations and charges made in said cross-petition were denied and it was alleged that if defendant Nachman held a note as she claimed, it is a counterfeit and forged note neither executed, uttered nor negotiated by Wescott, while he was the owner and holder of said property, nor at any other time.

The chancellor heard the evidence and rendered a decree finding that the note held by plaintiff Yeomans "was the first of the two notes for \$2000 executed by said C. B. Wescott negotiated and delivered by the said J. S. Chick Investment Company under and in

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pursuance of authority given the said J. S. Chick Investment Company by the owner of the property described above; and the plaintiff, Edwin S. Yeomans, the owner and holder of said note is entitled to the exclusive benefit of the deed of trust of date of January 15, 1912, from C. B. Wescott described above; and the other note of \$2000 signed by said C. B. Wescott, now held by the defendant, Minnie Nachman, is unsecured by the deed of trust of date January 15, 1912, by C. B. Wescott above described, and the said defendant, Minnie Nachman, is not entitled to a lien either legal or equitable on the above described real estate securing said note." The right of Yeomans to hold his note as a first lien on the property and to have the benefit of the security of the deed of trust was accordingly adjudged to him, while all right to a lien or judgment of any nature was denied Mrs. Nachman. From this decree she appealed.

The Ice Company, conceding that its land is subject to the deed of trust, is willing to pay the debt secured thereby to whomsoever is the true holder thereof, but it very strenuously opposes the idea that it should be required to pay more than one note. We do not understand that Mrs. Nachman now questions that part of the decree which finds that the Yeomans note is the one secured by the deed of trust and which awards to him the right to the security thereof. Indeed, there can be no doubt that the decree is correct in this regard. The deed of trust was executed January 15, 1912. Yeomans bought his note of the Chick Investment Company on February 19, 1912, and received it in due course, for value and duly endorsed, scarcely more than a month after its execution and long before any interest thereon had accrued. Mrs. Nachman did not obtain her note from the Chick Investment Company until September 2, 1914, a little more than two years and a half after its execution, and after five interest coupons had become due. So that the controversy now is no longer between Yeomans and Mrs. Nachman but solely between the latter and

the Ice Company as to whether it shall be required to also pay Mrs. Nachman's note.

The theory, upon which appellant seeks to hold the Ice Company and its property liable for the payment of her note, is that she is an innocent holder thereof, having purchased it for value before maturity and without notice, actual or constructive, of the fraudulent duplication; and the Ice Company, having placed the title of its lot in a straw man for the purpose of obtaining a loan thereon, and having carelessly left said matter entirely to its agent, J. S. Chick, Jr., or which is the same thing the Chick Investment Company, and having negligently allowed the legal title to its property to be placed in Wescott's name, said company thereby became bound by the fraudulent acts of Wescott or Chick, and, since said company's negligence made possible the fraudulent duplication, it should stand the loss, on the principle that where one of two innocent persons is to suffer, it should be that one whose carelessness and confidence put into the hands of the wrongdoer the opportunity and means of doing the wrong; and that the Ice Company, having placed the title to its property in a straw mortgagor and carelessly left said matter to its agent Chick, one or both of whom made her note and perpetrated the fraudulent duplication, is now estopped from disputing appellant's right to a lien. The principles on which appellant's theory rests are well established. [National Safe Deposit Co. v. Hibbs, 229 U. S. 391, 396; Fairgate Realty Co. v. Drozda, 181 S. W. 398, 400, 402; Allen v. South Boston R. Co., 5 L. R. A. (Mass.) 716; 5 Thompson on Corp., sec. 6325; Brown v. Kansas City Southern R. Co., 187 Mo. App. 104, 112; Leonard v. Shale, 266 Mo. 123; Schultze v. McLean, 93 Cal. 329, 357; 27 Cyc. 1036; Guffey v. O'Reiley, 88 Mo. 418; Burson v. Huntington, 21 Mich. 415, 432; 2 Herman on Estoppel, secs. 766, 777; 16 Cyc. 773; Roumeloit v. Missouri Pac. R. Co., 165 S. W. 818; Houtz v. Hellman, 228 Mo. 655, 669-71; Rieschick v. Klingelhoef, 91 Mo. App. 430, 433; Riley v. Vaughn, 116 Mo. 169, 178; Barrett v.

Baker, 136 Mo. 512, 517.] But the difficulty is in the application of these principles to the facts and circumstances of appellant's case. And the correct solution of the problem presented is further complicated by the difficulty in "determining what acts or conduct of the party sought to be charged, can properly be said to have enabled the third person to occasion the loss within the meaning of the rule." [Burson v. Huntington, 21 Mich. 431-2.]

The facts considered necessary to an understanding of this feature of the case are these: J. S. Chick, Jr., was the president of the J. S. Chick Investment Company and so controlled and managed the same that for the purposes of this case the two, Chick and his company, may be treated as one and the same. He and it were engaged in the real estate and loan brokerage business. Chick was also the Secretary and Treasurer of the Ice Company; and whenever the latter needed anything in the way of real estate deals or loans, that matter was turned over to Chick, or his Investment Company, as the Ice Company's agent to attend to same. Chick himself attended to it and did so in his capacity as agent for the Ice Company rather than as Secretary and Treasurer of the latter. Wescott was a man of straw in the office of the Investment Company. In the real estate matters turned over to Chick by the Ice Company, the latter trusted Chick implicitly and left the details to him and exercised no supervision over him as to how or in what way he transacted the real estate matters for the Ice Company.

The land described in the deed of trust is Lot 97 Campbell's Addition to Westport. It is a vacant lot adjoining, and on the north side of, the land on which the Ice Company erected its plant. The Ice Company was incorporated the latter part of 1906. Said Lot 97 was acquired by the Ice Company August 15, 1908, but the title was not taken in its name but in that of Mary M. Winship, a bookkeeper in the Chick Investment Company. On the same day, she executed a deed of trust thereon for \$2000, with the Chick Investment

Company as *cestui que trust*, to secure a loan of that amount made by one Kiger. Two days later, August 17, 1908, she conveyed said lot to the Ice Company. On the 31st of October, 1908, the directors of that company, with the full knowledge and consent of the stockholders, passed a resolution authorizing the reconveyance of said Lot 97 to Miss Winship subject to said \$2000 loan and this was done. No money passed in these transactions between the Ice Company and Miss Winship, she being a mere "straw woman" holding the title, the purpose being to get the title to Lot 97 out of the name of the Ice Company and into that of a straw person. The Ice Company says the reason it did this was that it was about to issue bonds on its plant and did not want the bonds to cover the vacant lot because they contemplated erecting on it a duplicate plant and therefore wanted it free from the bond issue so that when the duplicate plant was erected, bonds could be issued on it for the cost thereof. From October 31, 1908, until February 28, 1912, the title to Lot 97 was allowed to remain out of the Ice Company's name, the company letting Chick, as stated, direct the manner of keeping the title to Lot 97 separate from its other property, and it did whatever he suggested in this regard. The account books of the Ice Company were also kept in Chick's office. The company exercised no care or supervision whatever over Chick to see what was being done in regard to the title to said Lot 97. It seems that Kiger, who held the \$2000 loan on the lot, wanted his money; and the matter of getting a renewal, and the manner of doing so, was left to Chick to manage as he saw fit, just as other similar details relating to real estate had been left to him. Chick had Miss Winship convey said lot, for a recited consideration of \$12000, to C. B. Wescott, as stated, a man of straw connected with the Chick Investment Company, and who, the evidence shows, was employed and paid to act as such. This deed was made January 15, 1912. On this same date, he executed the deed of trust in controversy to secure the note therein described, and then conveyed the lot, subject to said deed of trust, to the

Ice Company, the deed from him being for a recited consideration of \$12000, dated January 15, 1912, acknowledged January 16, 1912, and recorded February 28, 1912. During all this time the actual ownership of the lot was in the Ice Comapny, it authorizing and allowing the title to be held in the name of a straw owner and authorizing the making, by a straw person, of the deed of trust of January 15, 1912, in substitution for the Kiger loan; and while the company may not have actually known that the title was put into the straw man Wescott in making the loan, yet, as all details were left to Chick to manage as he saw fit, and no supervision over him was had, it is the same as if the company knew of and consented to that also. The company must also have had constructive knowledge of this from the records from and after February 28, 1912, the date of the recording of the Wescott deed to the Ice Company.

On account of the foregoing facts and circumstances, it is claimed that in equity the Ice Company should be required to pay Mrs. Nachman's note and is estopped to deny its validity.

By her pleading, Mrs. Nachman has planted her case on the premise that her note bears the genuine signature of Wescott and that any fraud perpetrated was by him in executing two notes in duplicate. So that in order for her proof to correspond strictly to her pleading, the burden is on her to show that her note bears Wescott's genuine signature and is not mere forgery afterwards committed by Chick and sold by him to her. The Ice Company contends that there is no evidence to show that Wescott signed Mrs. Nachman's note in addition to the one Yeomans got. We think the evidence tends to show her note bears his true signature but that it does not show when it was signed. Miss Winship, who took the acknowledgment to the deed of trust, and who was acquainted with his signature, testified that the signature on the two notes is the same. When the deed of trust was executed Miss Winship had no idea or knowledge of his signing more than one note; and

while she thinks he signed other papers than the deed of trust and note, she does not know what they were, but would not say that more than one note was signed. Wescott was not called as a witness nor was Chick, and there was no other evidence offered as to the genuineness of the Nachman note nor as to when it was executed. We think, therefore, that the evidence shows that appellant's note bears Wescott's true signature but does not show *when* he signed it. So far as the evidence affirmatively shows, Chick may have fraudulently induced Wescott to sign it afterwards. Appellant relies upon section 9982, Revised Statutes 1909, as creating the presumption that the date on her note is the date it was made. If we concede that said statute applies to this note as well as to a valid note about which there is no suspicion, we may treat appellant's case on the theory that the evidence supports her claim that the two notes were fraudulently executed by Wescott at the time the deed of trust was executed. However, even if both were executed at the same time, only *one* could be the true note, depending upon which one was first negotiated, and as Yeomans' note was that one, the other is not *the genuine note* secured by the deed of trust. [Quinn v. McCallum, 178 Mo. App. 241.] So that the deed of trust in and of itself can have no efficacy in giving appellant a right to any lien on the Ice Company's property. Chick first sold Yeomans' note to him, and years later, sold Mrs. Nachman's note to her. Clearly, the *proximate* fraud or the fraud *operating on Mrs. Nachman* was that of *Chick* in selling to her a note the original of which he had already sold to Yeomans. The Ice Company denied that Wescott executed or negotiated the note held by Mrs. Nachman, and, therefore, if her note was not signed by Wescott, then it was not his fraudulent duplication that caused the loss, as pleaded by Mrs. Nachman, but was Chick's fraud in forging a note and selling it to her. In that event, aside from a mere difference between her proof and her case as pleaded, she has failed to establish the case as presented. We

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prefer, however, to regard the evidence as establishing that Wescott did sign the note Mrs. Nachman got, and we will treat her case on the assumption that he did so at the time the other note and deed of trust were signed. In which event his act in so doing, whether intentional and a matter of actual fraud on his part, or whether he was innocently induced to do so by the machinations of Chick, resulted in a fraud on Mrs. Nachman, so that she cannot be denied relief on the ground that she has failed in her proof in the particular above mentioned. It is important to note, however, that the fraud which finally and effectually caused Mrs. Nachman's loss was Chick's fraud in selling her the note she got, which of course was a fraud on his part, since he had already sold to Yeomans the note he received. This is important because, in selling her this note, he was not acting as agent for the Ice Company. So far as Mrs. Nachman was concerned, he was selling her a note the Investment Company held. He was acting for himself and the Investment Company and was selling a note to his and its customer. The Ice Company had nothing to do with selling the note to her. It knew nothing of it. The Ice Company knew nothing of her, paid her no interest, and had no dealings whatever with her. She did not go to Chick as Secretary and Treasurer of the Ice Company. She went to the Chick Investment Company, as she had done once before, to purchase a note as an investment of her money. The fact that Chick happened to be Secretary and Treasurer of the Ice Company had nothing to do with inducing her to purchase said note, and Chick's knowledge is not the knowledge of the Ice Company. [Gregmoore Orchard Company v. Gilmour, 159 Mo. App. 204, 213-14; Third National Bank of St. Louis v. St. Charles Savings Bank, 244 Mo. 554, 606.] The agency in Chick created by the Ice Company to obtain a renewal of the Kiger loan had been fully performed by Chick when he got Yeomans to take it up, and thereafter the Ice Company regularly paid the interest to Yeomans for two years and more

before Mrs. Nachman got her note. It never knew anything about her note or about her until long afterward, possibly in the latter part of December, 1915, when the whole story of Chick's irregularities came to light and everybody found out the true situation, and this suit was instituted. From the time Yeomans got his note, the Ice Company paid him his interest down to the date of the discovery of the situation by all parties as aforesaid. Mrs. Nachman, when she bought her note of Chick in 1914, knew she was getting a note signed by a person named Wescott secured by a deed of trust on land belonging to the Ice Company, yet she made no inquiry to learn who Wescott was, nor did she disclose herself in any way to the Ice Company at any time although she thought her security covered its entire plant worth many times the amount of her loan. She made Chick her agent to collect her interest and received it from *him*, not from the Ice Company. Under all these circumstances we do not see what knowledge the Ice Company had of Mrs. Nachman or of her note, nor what it failed to do, which should estop it from contesting the validity thereof. None of the money she paid to Chick ever went to the Ice Company. Her loss was caused by Chick's fraud and in so doing he was either acting for himself and his Investment Company or as her agent. It is true the Ice Company trusted Chick and relied implicitly upon him to renew the Kiger loan. This he did, and that task was fully completed long before the fraud on Mrs. Nachman was perpetrated. But the act of the Ice Company, in trusting Chick to renew said loan and allowing him to do so in his own way, was no more negligent than—certainly not as much so as—Mrs. Nachman was. She trusted him implicitly too, accepted without question what he told her, and made him her agent to collect the interest. He paid her this, but not out of any funds belonging to the Ice Company or in any way that charged the company with notice that she also had a note against its property. Chick's reputation for honor and integrity was

unquestioned at this time. The reasons for renewing the Kiger loan, and for keeping that property free from the entanglements of the Ice Company's bonded indebtedness, were legitimate and proper, and if the Ice Company was negligent in trusting Chick, so also was Mrs. Nachman, and more so, as we shall presently see. This is not a case where Wescott, the straw man in whom the Ice Company permitted its title to be placed, made two deeds of trust. If that were the situation an entirely different question would be presented. The situation here is that Chick was the agent of the Ice Company to do a certain thing which was legitimate and proper. He performed his task as such agent, and the Ice Company supposed and had a right to think, that it was ended. Afterwards, and while acting as agent for Mrs. Nachman, or as agent for his Investment Company in selling her a bond, he succeeded in defrauding her. Of this the Ice Company had neither actual nor constructive knowledge. Nothing that it did, or failed to do, induced Mrs. Nachman to purchase the note. We, therefore, fail to see wherein an estoppel is created against it.

But appellant says that she is an innocent holder and where one of two innocent persons must suffer for the act of a third, the loss should fall upon that one who afforded the third party the opportunity of doing the wrong and enabled him to perpetrate the fraud and cause the loss. We do think that, under the facts of this case, Mrs. Nachman is an innocent holder, and, if she was not, then also arises the question whether it was her conduct and not the Ice Company's that enabled the fraud to be perpetrated. Because, as to her, the fraud was not complete nor her loss *accomplished* until Chick sold her the note.

The note provided that if default was made in the payment of any of the interest when due, then the whole note, principal as well as interest, could become due. At the time she bought the note at least five of the interest coupon notes were past due and were

unpaid as they were still attached to the note. These Chick tore off in her presence and with her knowledge and consent. She testified to this herself. It is true she afterwards went upon the stand and said she did not understand what was asked of her in that regard and that she did not really remember what coupons were on the note at the time she bought it. But her former testimony is so clear and explicit that we accept it as she at first gave it. The coupons were themselves promissory notes but only the bond itself was endorsed. The deed of trust said that the holder of the note had the privilege of paying \$500 or any multiple thereof at any interest paying period, but the bond said nothing about any such privilege. In this respect, the note did not conform to the description thereof contained in the deed of trust. It is true Yoemans' note did not have such a clause either, but this is immaterial, since the point is that, so far as Mrs. Nachman is concerned, there was a difference between her note and the description thereof in the deed of trust, both of which she obtained at the same time. She accepted the opinion of Chick's attorney as to the title to the land at the time the deed of trust was given, but it gave no information as to the title or ownership thereafter. She did not know who the maker of the note was. Never investigated or made inquiries, nor did she ever look to the Ice Company, inform it or communicate with it in any way. She left the entire matter with Chick, accepted what he said about it, and made him her agent in all matters pertaining to it. Under such circumstances Mrs. Nachman cannot claim that she was wholly without notice of the note's infirmities. [Merchants National Bank v. Brisch, 154 Mo. App. 631, 639.] Nor can she claim that it was not her negligence but that of the Ice Company that enabled Chick to accomplish his fraud upon her.

We do not understand that in her pleadings Mrs. Nachman has based her claim against the Ice Company upon the fraud of *Chick* as its agent, but if her plead-

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ing may be regarded as including that charge, then, clearly, when Chick accomplished the fraud and caused the loss, he was not acting for, but against, the Ice Company. He had performed the duty assigned him by it, and in selling to Mrs. Nachman her note he was wholly outside of the scope of his employment, and there was no *apparent* authority from the Ice Company upon which she relied or on account of which she was induced to buy the note [Keyser v. Hinkle, 127 Mo. App. 73; 31 Cyc. 1584; Whiteaker v. Chicago Rock Island & Pac. R. Co., 252 Mo. 438, 458; Garretzen v. Duenckel, 50 Mo. 104; St. Louis, etc., R. Co. v. Harvey, 144 Mo. 806, 809; Hellriegal v. Dunham, 192 Mo. App. 43.]

It is unfortunate and distressing that Mrs. Nachman has fallen a victim to the fraudulent practices disclosed by the evidence in this case. But while she is entitled to sympathy, there is, in our view, no ground upon which a court of equity can rightfully require the Ice Company to make good her loss. The decree is, therefore, affirmed. All concur.

ROBERT E. BATES and ROBERT W. BATES, Respondents, v. F. H. WERRIES and MARY A. WERRIES, PARIS J. KEYS, RAY COUNTY COAL COMPANY and JOHN M. CLEARY, Administrator, Appellants.

Kansas City Court of Appeals, December 3, 1917.

1. **EQUITY: Corporations: Suit for Receiver Pendente Lite by Stockholders: Majority Sale.** Courts of equity will not interfere in the internal management of corporations to settle mere quarrels and differences of opinion between stockholders, as the principle that the majority must rule is rigidly upheld in the absence of fraud, oppression etc. But where the action of the majority is so wholly opposed to the interest of the corporation and the minority stockholders, that it amounts to a fraudulent or wanton destruction of
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the latter's rights, and the minority is otherwise remediless, equity will grant relief.

2. ———: ———: ———: **Grounds for Appointment: Ancient Equity Jurisdiction: Statute.** Under the principles of ancient equity jurisdiction and under the statute, section 3364, R. S. 1909, a court of equity has power to appoint a receiver *pendente lite* to carry on the business of the corporation during the pendency of a suit to determine who are the majority stockholders and to suspend and remove misbehaving directors who by fraud, conspiracy, covenous conduct or other extreme mismanagement, have jeopardized the rights of stockholders and have unfairly destroyed the original corporate *entente cordiale*. And this is true even where the corporation is solvent.
3. ———: ———: ———: In an action to remove misbehaving directors and to determine the ownership of certain stock so as to settle who are the majority stockholders and entitled to control the corporation, plaintiffs do not state themselves out of court by alleging that they are in reality the majority stockholders but their rights were not recognized and they could not obtain recognition of them. Nor does the fact that the offending directors have ceased their wrong doing remove the necessity for a receiver, since the dispute as to who are the majority stockholders still remains and the power still exists to again commence the acts complained of, the moment the chancellor's restraining hand is removed.
4. ———: ———: ———: **Decree: Matters not Within the Pleadings.** In an equity suit by stockholders to determine who shall control the corporation and to remove offending directors, in which petitioners asked for the restoration of specific funds alleged to have been misapplied but did not pray for a general accounting, the decree cannot include other misappropriations not mentioned in the bill for relief.
5. ———: **Issue of Stock: Consideration.** Where the incorporators deposited stock in the corporate treasury with an agreement that it was to be returned to them upon their performance of an agreement to pay a stipulated cash sum for other stock they had deposited, the return of the former stock to them after performance of the said agreement cannot be said to be without consideration.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb,*
Judge.

REVERSED AND REMANDED (*with directions*).

James Shannon, Joseph S. Rust, Morrison, Nugent & Wylder and Lavelock & Kirkpatrick for appellants.

James L. Ferris, Jr., & Sons and George W. Crowley for respondents.

TRIMBLE, J.—The litigation herein grew out of controversies between stockholders relating to the control, management and direction of the corporate affairs of the Ray County Coal Company, the title and division of certain shares of stock therein, and other matters incidental thereto. The suit was begun in Ray County, Missouri and went on change of venue to Chariton. There, upon a hearing as to the appointment of a receiver *pendente lite*, the court appointed The Richmond Trust Company as receiver and authorized it, upon acceptance and qualification, to take charge of the affairs of said corporation. The said receiver duly qualified and filed bond which was approved. From the order appointing a receiver *pendente lite* the defendants, F. H. Werries, Mary A. Werries, Paris J. Keys and Ray County Coal Company, appealed to the Supreme Court of Missouri, and the case was there known as No. 18,816. Afterwards, the case on its merits came to trial and a decree was entered in favor of plaintiffs, granting, in certain respects, the relief asked for, which will appear later on. From this decree the said defendants appealed to the Supreme Court of Missouri and the case was there docketed as No. 19,490. The two causes were there consolidated and argued and submitted as one case. The Supreme Court held that, as the record did not disclose the amount in dispute exceeded \$7500, it had no jurisdiction and transferred the case here. [See *Bates v. Werries*, 196 S. W. 1124.]

The Ray County Coal Company is a Missouri Mining Corporation organized in 1907. Originally there were four incorporators, and the stock was paid up by the conveyance to said corporation of certain coal lands in Ray county which the corporation now owns.

In order to provide the corporation with capital whereby to develop its mines, the incorporators turned into the treasury \$20,000 par value of the preferred

and \$20,000 par value of the common stock, with the agreement and understanding that each of said incorporators should buy one-fourth of said preferred stock at \$5000, and, with every five shares thereof, should receive three shares of the common stock. This, when done, would leave 80 shares of common stock remaining in the treasury; but the agreement was further that each incorporator, upon performing his part of the agreement by paying his \$5000, should also receive his equitable proportion of the said 80 shares, but if any incorporator defaulted in the payment of his \$5000, he should forfeit to the company his part of the said remaining 80 shares. All four of them, however, performed their part of the agreement. The mine was developed and put upon a going basis with the \$20,000 paid in; and, on December 7, 1911, the 80 shares not being needed for further development and the incorporators being entitled to said 80 shares under their performed agreement, the corporation through its board of directors ordered said 80 shares issued to said incorporators and their successors in the proportion above named, to-wit, 3 shares of common to every 5 shares of preferred stock. The record shows that the motion by which this was authorized was seconded and voted for by the defendant Mary A. Werries, then Mary A. Crawford, she at that time holding the stock originally held by her husband Charles Crawford one of the four original incorporators. These 80 shares were never issued to or divided among the incorporators as authorized and directed by the board although plaintiff Robert E. Bates thereafter demanded his *pro rata* share thereof. The disposition and vesting of the title to these shares was one of the matters sought to be adjudicated in this suit and is one of the things which the decree rendered therein sought to establish and determine.

The first petition in the suit, which was filed November 30, 1915, is not shown in the record. But it appears from said record that summons was issued and served on an amended petition filed January 6, 1915,

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and the complaints therein alleged as grounds for relief may be summarized as follows:

1. That the shares of stock held and claimed to be owned by Mary A. Werries were the property of her former husband Charles Crawford, now deceased, but from whom said Mary A. Werries had procured said shares while he was insane. (The evidence disclosed that plaintiff, Robert E. Bates, had, at the request of the then Mary A. Crawford, attested the supposed signature of her husband Charles Crawford, to an assignment to her of his said stock, and, on account of Bates' knowledge of the mental condition of said Charles Crawford, this allegation was made in the petition in order to safeguard the ownership of the stock and correct any error he had made in attesting said signature. However, upon the trial, the chancellor found that said Charles Crawford was of sound mind, and, as plaintiffs did not appeal, this issue is no longer in the case).

2. That the defendants, Mary A. Werries, F. H. Werries and Paris J. Keyes, acting directors of said corporation and constituting a majority thereof, are grossly mismanaging the affairs of said corporation and have conspired together to run the said corporation, its mine and business, for their own personal ends and benefit in total disregard of the best interests of said corporation and to the great loss and irreparable injury of said corporation and the plaintiffs; that the money and bank account of the corporation was altered and changed to the personal account of one of said directors defendant Keyes, who had commingled the corporate money with his own personal funds; that they were violating the laws of the State by practicing usury in the payment of employees, charging 10 per cent interest on the pay of miners when advanced before pay day was due, thereby making said corporation an outlaw; that, in line with their purpose to wreck and ruin the corporation, they had agreed to pay one of their number \$100 a month pretendedly as a salary for his services as superintendent, he being incompetent, inefficient, and not possessed of skill or knowl-

edge of coal mining so as to protect the lives of the miners. He was also charged with narrowing the possible mining area of the mine and greatly hazarding and jeopardizing the interest of the corporation and the lives of those working therefor.

3. That defendants, in order to obtain complete control and domination of said corporation, had made a pretended change in the by-laws whereby they have secured such control and have used the said corporation for their own personal ends and benefit, and plaintiffs as minority stockholders have no means of protecting their interest against the same.

4. That said F. H. Werries is wholly insolvent, and the solvency of the other defendants is uncertain, the real estate owned being heavily incumbered and other property being in stocks easily transferred and hid.

5. That said defendants seek to impose upon said corporation an unjust and unconscionable contract with an unincorporated concern known as the Willow Creek Coal Company, in which defendants are silent partners; which, if carried out, would ruin the corporation and which contract is a mere gratuity to the Willow Creek Coal Company and purely for the interest and benefit of said defendants, or one of them.

6. That by reason of the conduct of said defendants and their gross mismanagement of the affairs of said corporation the assets thereof will be frittered away and lost to the stockholders.

The petition then prayed that a receiver *pendente lite* be appointed; that the contract with the Willow Creek Coal Company be cancelled; that Keyes be required to pay to the Receiver the money he had received belonging to the company and that an accounting therefor be had; that defendants be enjoined from interfering with the management of the mine and that they be removed as directors and that all other equitable relief be granted.

Later, but before the hearing for the appointment of a receiver *pendente lite* was had, another amended

petition was filed which, in addition to the above, set up the following:

(a). The order of the Board of Directors, made December 11, 1911, whereby the above mentioned 80 shares were ordered distributed among the incorporators in accordance with the aforementioned agreement to purchase preferred stock.

(b). That none of this stock had been distributed; that since the institution of the suit plaintiff Robert E. Bates had, through one Guy R. Murray, purchased the stock held by Keyes, and plaintiffs were now the owners of a majority of the stock, but that the defendants, F. H. and Mary A. Werries were wrongfully claiming to own a controlling interest in the stock of said company and had elected themselves to offices in the directorate and were no longer running the mine but allowing it to be idle and to deteriorate.

(c). That said defendants refused to issue 40 shares, of the said remaining 80 shares, to plaintiff Robert E. Bates, that being the proportionate share to which he was now entitled by reason of his present ownership of stock.

(d). That plaintiffs own the controlling interest in said corporation when their rights and interests have been determined and fixed by the court.

(e). That plaintiffs are helpless and remediless without the interposition of a court of equity.

In addition to the former prayers, the petition prayed that the title to said 40 shares be adjudged to be in plaintiff Robert E. Bates and that they be ordered to be issued to him; that the present directors be ousted; and that new directors be appointed to proceed and hold elections as the law directs.

The defendants filed separate answers. Keyes set up that he had, since the institution of the suit, transferred all his interest in the Coal Company to Murray for plaintiff Robert E. Bates, and asked to be discharged. The defendants Werries filed a general denial, with an allegation that plaintiffs were estopped to question either the title of Mary A. Werries to said stock in the company, or the right of defendants to

act as directors. The Ray County Coal Company's answer was (1) a general denial, (2) that plaintiff Robert E. Bates be required to account for money he owed the Coal Company the amount of which was unknown, and (3) that defendant Keyes be also required to account. Defendant Cleary, Administrator of Charles Crawford, deceased, disclaimed knowledge of the allegations of the petition and called for strict proof.

Upon final hearing, the chancellor found as follows:

(1). That the Ray County Coal Company was organized, its stock was originally paid up, a part thereof turned back into the treasury for development purposes, and that \$20,000 par value of the preferred stock was purchased by the four incorporators with the agreement to share in the common stock including said 80 shares as has been herein above set out; that upon the full performance of the agreement to buy said preferred stock, and by the resolution of the Board passed December 11, 1911, the said 80 shares became and was in equity the property of said original incorporators and their successors, and that as Robert E. Bates is now the owner of 100 shares of said preferred stock and Mary A. Werries is now the owner of 100 shares thereof, each of said parties is now entitled to 40 of the said 80 shares apparently remaining in the treasury.

(2). That on November 10, 1914, Robert W. Bates, Robert E. Bates, F. H. Werries, Mary A. Werries and Paris J. Keyes were the directors of said Company and Robert E. Bates was the president thereof and, since the incorporation of said company, had at all times managed the affairs of the corporation with efficiency and fidelity to the stockholders. But that on December 10, 1914, defendants, being a majority of the board, conspired together to wrest the management of the company from Robert E. Bates so that they might control the same and gather to themselves an undue portion of its profits.

(3). That defendants, in behalf of said company and assuming to act for it, entered into a contract with the Willow Creek Coal Company which was inequitable

and not in the interest of the corporation but which was a subterfuge and device provided by the defendants as a means whereby they might appropriate an unearned share of the profits of the corporation.

(4). That said defendants attempted to pass by-laws with the purpose and intent to provide means whereby Robert E. Bates might be removed as an officer and director of the company; and pursuant to said by-laws and in furtherance of their conspiracy, filed charges against said Bates which were without foundation and which were made merely as an excuse for ejecting him as an officer of said company.

(5). That during the time the defendants have been in charge of the company its records have been kept in such condition that the court is unable to ascertain the financial status of the corporation, the amount of coal marketed or whether coal is produced at a profit or loss.

(6). That Charles Crawford, at the time he assigned his shares to Mary A. Crawford now Mary A. Werries, was of sound mind.

(7). That the defendant Keyes transferred his stock to Murray who transferred it to Robert E. Bates, and that of the stock actually issued, Robert E. Bates, at the date of the decree, owns 100 shares of preferred and 268 shares of common stock, the defendant Mary A. Werries owns 100 shares of preferred and 249 shares of common stock; that F. H. Werries owns 2 shares, and C. H. Borintz owns 1 share of the common stock,

(8). That out of the funds of the company the defendants F. H. and Mary A. Werries paid, on November 1, 1915, \$280 fees to certain attorneys for services as their personal representatives but not for any services rendered the defendant Ray County Coal Company, that said sum should, with 6% interest, be charged against them; that on February 3, 1915, the defendants, out of the funds of said corporation, paid \$700 to certain other attorneys for services rendered defendants personally and not for any services ren-

dered the corporation or necessary for its protection, and that said amount should be repaid to said corporation.

(9). That under the alleged contract with the Willow Creek Coal Company \$207.90, as alleged commissions on coal sold, was paid to the defendant F. H. Werries and that it should be repaid by him with interest at 6% from August, 1915.

(10). That the defendants have abused their trust as directors and officers of the corporation, have grossly mismanaged its business and property, should be removed from their positions as officers and employees of the company, and that a receiver should be appointed to take charge of its property and affairs.

It was thereupon adjudged and decreed:

"1st. That the plaintiff R. E. Bates and Defendant Mary A. Werries each be vested with the title to 40 shares each of the common stock of the defendant Ray County Coal Company, and now in the hands of said Coal Company, and the receiver of said company, hereinafter named, is directed to issue to said R. E. Bates and Mary A. Werries certificates for said 40 shares of stock, and said receiver is further ordered to issue to R. E. Bates renewal certificates for 50 shares of preferred and 134 shares of common stock, purchased by said R. E. Bates or Paris J. Keys, upon surrender properly signed and indorsed the outstanding certificates for said stock, and to transfer upon the books of said coal company any other stock to the purchasers thereof upon a surrender of the certificates therefor properly indorsed.

2nd. That the defendants F. H. Werries and Mary A. Werries be removed as officers, directors or employees of the defendant company, that they each of them be and they are hereby enjoined and restrained from exercising any control, direction or management over the property, business or effects of the defendant Ray County Coal Company, and they and each of them are hereby directed and commanded to pay to the receiver, hereinafter named, any moneys in their hands the property of the defendant coal company; that they

surrender to said receiver all the property, books, records and evidences of debt due the company of every kind and character, and that they and each of them refrain from interference in any way, with the management of the Ray County Coal Company, by said receiver.

3rd. That the contract entered into by F. H. Werries, Mary A. Werries and Paris J. Keys on behalf of the Ray County Coal Company with the defendants F. H. Werries and W. S. Curdy under the firm name "Willow Creek Coal Company" be and the same is hereby canceled and held for naught.

4th. That on account of the moneys paid to James Shannon and Gilbert Lamb, the defendant Ray County Coal Company shall have judgment against the said Mary A. Werries and F. H. Werries in the sum of \$280 with 6 per cent interest from this date, that execution issue therefor.

5th. That on account of commissions paid the defendant F. H. Werries the said Ray County Coal Company shall have judgment against the said F. H. Werries in the sum of \$219.25, with interest from this date at 6 per cent interest from date, and that execution issue therefor.

6th. That on account of the moneys paid Lavelock and Kirkpatrick as herein set out, the defendant Ray County Coal Company shall have judgment against the defendants Paris J. Keys, Mary A. Werries and F. H. Werries in the sum of \$731, with interest at 6 per cent from this date, and that execution issue therefor.

7th. That the Richmond Trust Company is hereby appointed receiver of the Ray County Coal Company; is directed to take immediate charge of the properties of said mine of every kind and character, to take charge of all its records, books, moneys and evidences of debt of every kind. That it proceed immediately to collect, sue for and recover all moneys and property due said company. That it continue said mine in operation, that it employ such assistance as it may require; that if necessary it be, and is hereby empowered to borrow money on the credit of the defendant company to con-

tinue its operation. And that it ascertain as soon as may be the financial condition of the defendant company, and that it report the same, together with a report of its administration, of this trust to this court, at each regular term thereof, until the further order of this court.

8th. The bond of The Richmond Trust Company as receiver is fixed at the sum of \$10,000.

9th. That all the costs hereof be taxed against the defendants."

Defendants' contention, made for the first time in the appellate court, that the petition is insufficient, cannot, we think, be successfully maintained. Taking it altogether, it is not a mere mass of legal conclusions without the allegation of any facts upon which relief can be sought or obtained. Certainly it does not so wholly fail to state any cause of action as to constitute no basis whatever for the granting of any relief. It is true, courts of equity will not interfere to settle mere quarrels and differences of opinion between stockholders as to the manner in which a corporation should be managed. And in the conduct of a corporation's internal affairs the principle that the majority must rule is rigidly upheld in equity in the absence of fraud, oppression, etc. [4 Thompson on Corp., sec. 4533.] Nor should a court of equity interfere in doubtful cases where the action of the majority may be susceptible of different constructions; but where such action is so wholly opposed to the interests of the corporation and the minority stockholders that the conduct of the majority amounts to a wanton or fraudulent destruction of the rights of the minority, a court of equity will take cognizance of the matter at the suit of the minority. [Gamble v. Queens County Water Co., 123 N. Y. 91.] It is also true that such minority, in imploring the aid of equity, must show that it is otherwise remediless. [Vogeler v. Punch, 205 Mo. 558, 575.] However, the petition in its entirety raises far greater issues than those arising over a mere dispute as to who should hold the offices in the corporation or a quarrel as to

the way its affairs should be best managed. While the word "fraud" is not used in the petition, yet the situation it presents is a revelation of fraud in law, to say nothing of oppression and wrongful arbitrary and unjust conduct whereby the rights of the minority stockholders were not only substantially injured but were also in a fair way to be destroyed. And it is clear, from the nature of the evils to be avoided by the suit and the nature of the relief asked, that the best interests of the corporation are sought and that the just and lawful rights of all the stockholders will be preserved by the chancellor's interposition.

Nor does the petition fail to present grounds justifying the appointment of a receiver. In *Cantwell v. Columbia Lead Co.*, 199 Mo. 1, l. c. 43, it is said:

"The board of directors of a corporation are but trustees of an estate for all the stockholders and may not only be amenable to the law, personally, for a breach of trust, but their corporate power under color of office to effectuate a contemplated wrong may be taken from them when, by fraud, conspiracy or covinous conduct, or extreme mismanagement the rights of minority stockholders are put in imminent peril and the underlying, original, corporate *entente cordiale* is unfairly destroyed."

It was necessary that the business of the corporation go on during the litigation, and this was the purpose of the appointment of the receiver. It is a receivership *pendente lite*, and a court of equity has power to appoint a receiver for such purpose. [High on Receivers (4 Ed.), sec. 83a, p. 113; *Exchange Bank v. Bailey*, 39 L. R. A. (N. S.) 1032.] Imperfections in the bill do not bar the appointment. [High on Rec. (4 Ed.), sec. 86.] It also has such power under the circumstances presented by the petition. [High on Rec. (4 Ed.), sec. 292, pp. 347-9, sec. 295a.] And this is true, in cases like the present, even where the corporation is solvent. [High on Rec. (4 Ed.), sec. 295b.] In the condition presented, legal remedies would, if they could be pursued, be inadequate and insufficient, and

this justifies the resort to the suit herein. [34 Cyc., p. 25.] The basis of plaintiffs' cause of action is not to be found alone and only in the principles of ancient equity jurisdiction, but, if it were, the situation here presented is amply sufficient to call for the exercise of such jurisdiction. The power to appoint a receiver in a situation like this is also conferred by statute, and plaintiffs' cause of action is also based thereon. Section 3364, Revised Statutes 1909, gives the circuit court power (1) to compel directors of a corporation to account for their conduct in the management of the funds, property and business committed to their charge, (2) to decree payment by them to the corporation of money they may have acquired to themselves or transferred to others or have wasted by the abuse of their powers, (3) to suspend any director whenever it appears that he has abused his trust, (4) to remove him upon proof of gross misconduct, (5) to direct, if necessary, new elections to be held to supply vacancies caused by such removal. Section 3365 authorizes the court to appoint a receiver to take charge of said corporation, collect the debts due it, etc., subject to the control of the court. Section 3366 provides that the jurisdiction so conferred shall be exercised on petitions filed at the instance of any stockholder.

Nor can we agree with defendants' contention that the evidence does not support the chancellor's finding as to the agreement by which the 80 shares of stock became the property of the incorporators when they performed their agreement to buy at par one-fourth of the preferred stock in the treasury. The evidence shows that such was the contract; and the order passed by the Board of Directors at the instance of Mary A. Werries, and with her vote, shows that such contract was fully performed on all sides not only by the incorporators but also by the corporation, and nothing remained to be done except to divide and turn over the said stock. The action of the Board of Directors, in the light of the evidence and of the language of the

motion itself, is not susceptible of any other reasonable interpretation.

It may be true that Mrs. Werries has, since her control of the corporation, advanced money for the benefit of the corporation, but, if so, she has a claim against it as a *creditor* which can be recognized and adjusted in that way. Certainly she cannot claim to own 20 of the said shares as a *purchaser* by reason of such advancements since she had the fullest notice that the 80 shares, although not formally issued, were nevertheless not really in the treasury for sale but belonged to the incorporators. It is contended that Mr. Bates has formally admitted she became the purchaser of said 20 shares. But this was contained only in an offer to compromise and settle the suit. That was no more than an offer to *regard* and *treat* her as a purchaser thereof in a compromise and settlement of the case. The offer was not accepted and the compromise never became effective. Nor has the court *given* 40 shares of said stock to Mr. Bates without anything being received in return. The consideration for said shares was paid by all the incorporators when, pursuant to the agreement, they purchased the preferred stock and paid their money therefor with the understanding they were also to get back their equitable proportion of said shares. And Mr. Bates, as one of the four incorporators and as the successor to another, both of whom had performed their agreement, became entitled to 40 of said shares. Mrs. Werries, as the successor of the others, became entitled to the other 40 shares.

It seems that Keyes, in consideration of \$1 had assigned his stock to Mrs. Werries to be held and voted by her until certain money advanced by her to the corporation had been repaid when his stock should *ipso facto* be released. And it is contended that the court should not have decreed the Keyes stock to Bates as having been sold by Keyes to him through Murray, but that Mrs. Werries was entitled to a judgment for said stock or at least should have been permitted to hold and vote the same until her debt was paid. But there is no showing that Mr. Bates, when he bought the

Keyes stock, knew of any such assignment, even if such assignment was anything more than a mere precaution to insure Keyes remaining on her side of the controversy.

Nor does it appear that at the time of the trial all reasons for the appointment of a receiver had disappeared. Conditions were practically the same, or if they had changed, such change consisted only in the ceasing to do certain things complained of but with the power to again commence them once the restraining influence of the chancellor's powerful hand was removed. The controversy over the ownership of the stock and as to who had the majority thereof and consequently where the right of control lies remained and is even yet insisted upon in opposition to the disposal thereof made in the decree. Nor did plaintiffs state themselves out of court by alleging that they were majority stockholders. The allegation, in effect, is that, in reality, they were majority stockholders but that their rights were not recognized and they could not obtain recognition of them.

The question of how long the receivership is to be continued is not before us, but we may venture to assume that it will not be continued any longer than necessary to enable the affairs and condition of the corporation to be disentangled and understood, and the conflicting claims of the different shareholders to be properly and impartially adjusted, which the disruption of the *entente cordiale* that should exist among them has heretofore rendered, and now renders, wholly impossible except through the interposition of a court of equity. In this way, Mrs. Werries, if she has a claim against the corporation for moneys advanced, can have it adjudicated and established, even though the decree thus far rendered does not give her a judgment therefor. Very properly it did not do so since it would seem that that issue was not within the scope of the pleadings.

And this brings up the question of the propriety of the 4th and 6th paragraphs of the decree relating to the repayment of \$280 and \$731, by F. H. and Mary

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A. Werries, which the decree says was paid by them out of the funds of the corporation for attorneys fees but which were for services rendered to them personally and not rendered the corporation. These elements of the decree were entirely outside of the pleadings. The petition did not pray for a general accounting but only that said defendants be required to pay back such sums as they received through the unlawful Willow Creek Coal Company contract. Nor did it ask that the said defendants be required to account for any other moneys. Since no mention was made of any expenditure of the corporate funds for private purposes or any private disposition of such funds, except through the said Willow Creek Coal Company contract, we not see how the prayer for general equitable relief could be regarded as bringing such unmentioned matters within the pleadings when there was no prayer for a general accounting. The decree therefore should have the said 4th and 6th paragraphs eliminated from it. If it is desired, the question of such expenditures and the liability of defendants to be required to repay them to the corporation may perhaps be litigated and adjusted during the pendency of the receivership, when the parties will have due notice of the issues to be raised and an opportunity to meet them. Section 3365 authorizes the receiver to sue for and recover the debts and property that may belong to the corporation.

The decree, in all other respects, is affirmed, but the cause is remanded with directions to modify same by eliminating therefrom the above mentioned paragraphs. All concur.

BANK OF KIRKSVILLE, Appellant, v. JOHN SLOOP ET AL., Respondents.

Kansas City Court of Appeals, December 31, 1917.

1. **NOTES: Endorsement: Bank Cashier: Directors: Ratification.** Under the provision of section 1112, R. S. 1909, the endorsement by a bank cashier of one of the bank's notes without previous author-
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ity from the board of directors, is void and cannot be ratified by the directors.

2. ———: **General Denial: Title to Note: Cashier: Authority.** Under a general denial, the makers of a promissory note to a bank, in an action against them by an indorsee, may show that the endorsee got no title by reason of the endorsement being made by the cashier of the bank who had not been previously authorized by the board of directors.
3. ———: **Title: Void Endorsement: Remedy of Endorsee.** Where the cashier of a bank endorses one of its notes without authority first had from the board of directors, no title is conveyed and the makers may make this defense against the endorsee. The remedy of the endorsee in such instance is to compel the bank to refund the purchase money; or, perhaps, to make an endorsement which will convey the title.

Appeal from Schuyler Circuit Court.—*Hon. N. M. Pettingill*, Judge.

AFFIRMED.

Higbee & Mills for appellant.

Saxbury & Saxbury and *Fogle & Fogle* for respondents.

ELLISON, P. J.—Plaintiff's action is on a promissory note. The trial court directed a verdict for defendant, whereupon plaintiff took an involuntary nonsuit.

The note was executed by defendants to the Farmers State Bank of Greentop for four thousand dollars with eight per cent interest from its date of July 26, 1915, due in ninety days. It was transferred to the plaintiff bank, on August 2, 1915, by the following endorsement in blank: "Without recourse. Farmers State Bank of Greentop, by W. L. Young, Cashier." Afterwards, on August 30, 1915, among other proceedings, the following entry was made in the record of a meeting of the directors of the latter bank: "Notice was taken of cash discount and approved that John Sloop guardian and curator of N. L. Caster et al note

to bank of Kirksville for \$4000 same being assigned without recourse on us.”

The petition alleged the execution of the note and its purchase by plaintiff and the endorsement we have set out. The answer of defendants was a general denial.

Defendants insist that the action of the cashier of the Farmers Bank in selling and endorsing the note was a nullity and did not convey title to the plaintiff. This insistence, under the express terms of the statute, is well founded. The statute (sec. 1112, R. S. 1909, in this respect re-enacted in Laws 1915, p. 146, sec. 90) reads that, “The cashier (of a state bank) or any officer or employee shall have no power to endorse, sell pledge or hypothecate any notes, bonds or other obligations received by said corporation for money loaned, until such power and authority shall have been given such cashier or other officer or employee by the board of directors, in a regular meeting of the board, a written record of which proceedings shall first have been made. . . . And all acts of endorsing, selling, pledging and hypothecating done by said cashier, or other officer or employee of said bank, without the authority from the board of directors, shall be null and void.”

This statute has several times been given a literal interpretation by the Supreme Court and Courts of Appeals. [Bank v. Lyons, 220 Mo. 538, 554; Bank v. Bank, 244 Mo. 554, 580, 599; Hume v. Eagon, 83 Mo. App. 576; Van Standt v. Hobbs, 84 Mo. App. 628, 632; Powers v. Woolfolk, 132 Mo. App. 354, 363; Miles v. Bank, 187 Mo. App. 230, 238; Musgrove v. Bank, 187 Mo. App. 483, 492.]

But it is said that the cashier's act was afterwards ratified by the board of directors at the meeting above noted. In other words, plaintiff asserts the validity of an act of the directors done after the cashier's endorsement, which the statute directs shall be done before, and if not the act declared to be “null and void.” There cannot be ratification in such circumstances. [See opinion of BOND, J., in Hume v. Eagon, supra, p. 583, and Musgrove v. Bank, supra, p. 492;

Long v. Long, 167 Mo. App. 83.] The case cited by plaintiff (Cantrell v. Davidson, 180 Mo. App. 410) does not apply.

Plaintiff insists that the effect of section 1112, Revised Statutes 1909 now section 90, Laws 1915, page 146, and the decisions thereunder, has been changed by the amendment to section 1099, Revised Statutes found in section 80 Laws 1915, page 140. The statute as found in the latter section reads that. "The board of directors of each and every bank organized or doing business under this article shall hold a regular meeting at least once each month and keep a written record of its approval or disapproval of each and every *purchase and sale of securities* and each and every *discount, loan, acceptance, renewal or other advance*, including every overdraft in excess of \$100 made since the last regular meeting of the board" etc. The words italicized are the changes made in section 1099 of the general statute, and the words "purchase and sale of securities" are the only ones affecting the present controversy. The sum and substance of plaintiff's contention is that if the board of directors is to "approve or disapprove" of a sale of securities after the sale has been made, it has the effect of annulling the provision of section 1112, now section 90, Laws 1915, page 146.

We think this is an incorrect view. The general statute (section 1112) is *rewritten* in the Law of 1915 (Sec. 90, p. 140), and as we have said above, it is declared therein that the cashier shall not have authority to sell the notes received by the bank for loans made by the bank, until he first gets authority from the board, and that if he does do so, his act is null and void. This reenactment of the statute was made by the Legislature with a knowledge of the construction placed upon it by the decisions of the Supreme and Appellate courts above cited, and it is not reasonable to say that the amendment to section 1099, was intended by the Legislature to turn its re-enactment of section 1112 of the general statute into meaningless and useless printed matter. Instead of intending such thing, it

intended to put express prohibition upon the right of the cashier of a bank to convey title to its assets and to annul his act if he attempted to do it. Otherwise a cashier might bodily strip a bank of its assets without its knowledge.

It is true that section 1099, as now amended by section 80, Laws 1915, page 140, should be held to serve some useful purpose, and we think that purpose is plainly secured by applying it to a regulation of the operation of the bank and the duties of the officers as between themselves and the bank. A bank cashier having been authorized by the board of directors, makes a sale of a part of its assets represented by a note; under this statute, it is the duty of the board to examine his report of the sale and ascertain when and how he carried out its orders, and to see that he accounts for the money in the manner directed. If he has carried out the direction of the board, his act will be approved. If he has not, it will be disapproved and he held responsible for dereliction in duty. This section of the statute, like many others in the same act, is intended to regulate the manner of conducting the bank as between the officers and the bank; and it manifestly should not have the effect of nullifying, by inference, express provisions found in a section further on in the same law. There is nothing new, or inconsistent, in requiring subsequent approval of things which must be previously authorized. They often subserve different purposes. If this law, as found in both sections, is obeyed, the bank's assets are safeguarded and the bank's internal management, orderly conduct and success in business are made secure.

It is of no concern of the purchaser of a note from the cashier whether the latter's act is afterwards approved by the board. His only concern is with the cashier's authority at the time of his purchase.

Plaintiff insists that defendants have no right to invoke the provisions of the statute, section 112 aforesaid, and endeavor to maintain that position by a course of argument we deem to be unsound. It is said that since the Farmers State Bank is not complaining, de-

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fendants cannot be harmed. But defendants as makers of the note have a right to question plaintiff's title. Its action is set forth in an ordinary petition on a promissory note alleged to have been duly endorsed to it by the Farmers Bank. If that is not true—if it has no title—it has no right to maintain the action. If the Farmers Bank has plaintiff's money and has not conveyed to plaintiff any title, plaintiff may compel it to refund, or, perhaps, if plaintiff prefers, to yet convey a title by proceeding according to the express provision of the statute.

The judgment is affirmed. All concur.

STATE EX REL. MAUDE M. COFFIELD, Relator,
v. THOMAS B. BUCKNER, Judge, Respondent.

Kansas City Court of Appeals, December 31, 1917.

1. **HABEAS CORPUS: Certiorari: Juvenile Court: Custody of Child.** A female child, seven years old, at the instance of her father, was adjudged to be the ward of the Juvenile court, a branch of a circuit court of Missouri, and taken into the care and custody of the court. The court placed her in charge of her mother who was to report to the court at stated periods. Afterwards the father obtained a divorce in a district court in Kansas and was awarded the custody of the child. He then came to Missouri and instituted a *habeas corpus* proceeding against the mother (his former wife) in another circuit court, which latter court discharged the child from the mother and the Juvenile court and awarded her to the father. On application of the mother, the Court of Appeals directed a writ of *certiorari* to the latter court requiring it to send to such Court of Appeals the record of the proceedings in the matter of the *habeas corpus*, and finding that such record contained the foregoing facts, held that the latter court had exceeded its jurisdiction in its judgment discharging the child from the custody of the Juvenile court and mother and quashed such judgment.
2. ———: **Return: Reply: Verification.** The facts stated in a return to a writ of *habeas corpus* will be taken as true unless denied in an answer or reply pleading properly sworn to; and a reply or answer not so verified is not sufficient.

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3. ———: **Excess of Jurisdiction: Custody: Certiorari.** Where a court exceeds its jurisdiction by a proceeding in *habeas corpus* by interfering with the judgment of another court of equal jurisdiction which had in its custody and care an infant child a writ of *certiorari* from a superior court is a proper remedy.
4. ———: **Successive Writs: Res Adjudicata.** Where a person restrained of his liberty is refused a discharge by a court on a writ of *habeas corpus*, he may apply successively to any court of superior jurisdiction in the order of their superiority. But if the person is discharged, the judgment therein is *res adjudicata* as to any other writ except new matter has arisen changing the *status*.
5. **JURISDICTION: Foreign State: Divorce: Custody of Child.** A district court in Kansas in which a divorce action is pending in awarding the custody of a child cannot deprive a Juvenile court in Missouri of its possession and custody of such child, the latter court having obtained jurisdiction before the action of the court in Kansas, and no effect will be allowed by the courts of Missouri to the action of the court in Kansas.

Original Proceeding in *Habeas Corpus*.

JUDGMENT QUASHED.

L. C. Boyle and *A. E. Watson* for petitioner.

Halbert H. McCluer for respondent.

ELLISON, P. J.—This is an original proceeding by *certiorari* begun at the relation of Maude M. Coffield, whereby it is sought to inquire into the validity of an order or judgment of one of the divisions of the Jackson County Circuit Court presided over by Judge Buckner in a *habeas corpus* proceeding in that court, begun by Lewis E. Coffield, whereby he sought to have the custody and care of an infant child named Charmain L. Coffield discharged from its custodian and awarded to himself, said infant being the child of Maude and Lewis. It is alleged in relator's petition for the writ of *certiorari*, that on the record in the *habeas corpus* proceedings such circuit court was without jurisdiction, or, at least, had exceeded its jurisdiction in

interfering with the custody and care of the child at the instance of Lewis Coffield.

Judge Buckner has made return of the record in the *habeas corpus* proceedings, including the order awarding the custody of the child to said Lewis Coffield. The writ of *habeas corpus* was directed to the relator herein, in whose immediate custody the child was, and she made return thereto, wherefrom it appears that she is the mother of the child and that she and the child living with her became residents of Jackson County, Missouri, in September, 1914. That subsequently, in October, 1914, proceedings were instituted in the Juvenile court of Jackson County (one of the divisions of the circuit court), a court of competent jurisdiction presided over by Judge Porterfield, by Lewis E. Coffield wherein it was sought to place such child in the custody, care and wardship of said court as provided by the statute, sections 4098-4122, Revised Statutes, 1909. Such proceedings in due time came for hearing, both the relator herein and Lewis E., the father, being present, when, after due consideration, a judgment of such court was entered declaring said child to be a neglected child and that she became the ward of the court. That subsequently said Juvenile court considering relator, the mother, to be a fit person to entrust with the conditional custody of the child, ordered such custody, with instructions that she should care for it and administer to it, reporting from time to time to the court as to its condition.

It is then further shown by such return in said *habeas corpus* proceedings, that after the judgment and orders of the Juvenile court had been entered, Lewis E. Coffield prosecuted a divorce suit in Allen county in the State of Kansas whereby, in entire disregard of the jurisdiction orders and judgments of the Juvenile court in Missouri, he sought to obtain, and did obtain, an order of the district court in Kansas awarding the custody of the child to himself, the child all the while residing in Missouri and a ward of, and in the custody of, the Juvenile court. That afterwards, the relator finding the judgment of the Kansas court had been rendered in her

absence and desiring to have it set aside, went there for that purpose, and the child needing her daily care, was permitted by the Juvenile court to accompany her under the condition and understanding that she should return it to the Juvenile court. That when she took the child within the territorial jurisdiction of the District court in Kansas that court wrongfully deprived her of the possession of the child and gave the possession to Lewis E. Coffield, the father. That she protested the action of such court, which finally modified its order by dividing the custody between the father and its maternal grandmother, this relator also staying with the grandmother while in Kansas and continuing her care of the child. It is then further stated in said return that she received notice from the Juvenile court in Missouri and the "Probation Officer" of that court directing her to return the child and to make report of its condition; that she thereupon returned the child to the Juvenile court in this State, and then, at the suggestion of the probation officer, she placed the child in the Loretta Academy in Kansas City, Missouri, as a pupil, but that such child, by order of the Juvenile court, remained the ward of such court. It is then stated in the return that the orders of the District court of Kansas were in total disregard of the jurisdiction first obtained by the Juvenile court in Missouri.

It is further stated in said return that Lewis E. Coffield is an unfit person to have the custody of a female child of tender years on account of his personal habits, conduct and mode of living, and that he would put her out in the custody of strangers or relatives. That he has not and does not now, contribute to her support.

It is finally stated in said return that the judgment and orders of the Juvenile court are in full force and effect and the child is the ward of said Juvenile court and that the division of the court issuing the writ of *habeas corpus* is without jurisdiction by that mode to interfere with the judgment of the Juvenile court by setting aside its orders and usurping its functions.

This return of the writ of *habeas corpus* issued by the division of the circuit court presided over by Judge Buckner must be taken as true unless denied by proper reply. [In re Breck, 252 Mo. 302, 319.]

There is a paper included in the record of the *habeas corpus* proceedings denominated a reply. It is merely a general denial "of each and every allegation contained in the return." It is not verified and therefore fails to meet the requirement of section 2468, Revised Statutes 1909, and cannot be accepted as controverting the truth of the return.

Accepting, therefore, the return to the writ issued by the division of the circuit court presided over by Judge Buckner, as the facts in the case, we must determine whether such facts disclose that such court had the lawful right, power or authority to discharge the child from the care, custody, and wardship of the Juvenile division of the circuit court presided over by Judge Porterfield.

By reference to the before mentioned sections 4098-4122, Revised Statutes 1909, it will be seen that in counties having more than one circuit judge, they shall designate one of their number to preside over a court which, for convenience, is called a Juvenile court. It will be seen that jurisdiction is conferred upon such court, upon complaint or information, to have "neglected" children, under sixteen years of age, brought before it and that it may take and keep the custody of a neglected child under that age, and that it may commit such child to some reputable person (sec. 4102) but such action taken by the court will not cause the court to lose jurisdiction and control of the child.

We have seen from the return in the *habeas corpus* proceedings made to the division of the circuit court presided over by Judge Buckner that the Juvenile division of the circuit court presided over by Judge Porterfield, was legally and rightfully in charge of the child now in controversy, having complete and lawful jurisdiction in the manner of its care and custody. It follows that the division of the circuit court pre-

sided over by Judge Buckner, when the facts appeared in the confessed return showing such jurisdiction and custody in the Juvenile court, exceeded its jurisdiction in proceeding with the *habeas corpus* proceeding and ordering the discharge of the child from the immediate care of its mother and from the jurisdiction and custody of the Juvenile court.

It is probable that the child was thus discharged by reason of the action of the district court in Kansas in the divorce proceedings assuming the authority to dispose of the custody of the child and place such custody with the father and others in that State. But we do not think the court in Kansas was clothed with authority to ignore the prior jurisdiction (asserted and acted upon) of the Juvenile court in this State. The mere fact that the child had, from necessity, been temporarily taken into Kansas by its mother did not oust the Juvenile court in Missouri of its jurisdiction, nor annul its proceedings; which, as we have seen, were regularly and lawfully asserted and taken at the instance of the relator (father) in the *habeas corpus* proceedings.

It is suggested that the proper remedy has not been sought; that a writ of *habeas corpus* from this court, or the Supreme court, should have been asked. It is true that successive writs of *habeas corpus* may be had by application to superior courts, but that is in instances where the person seeking the benefit of the writ has been remanded to custody he sought to escape, but where the party has been discharged, as in this case, that action is *res adjudicata* in a subsequent writ, unless there has been a change in status, circumstances, or conditions since such discharge. [In re Breck, 252 Mo. 302, 320, 321.]

In support of such suggestion it is further urged that the writ of *certiorari* is not a proper procedure. We think it has the authority of precedent. [State ex rel. v. Dobson, 135 Mo. 1; State ex rel. v. Broadbuss, 245 Mo. 123, 140, 141.] To allow success to the effort of Lewis E. Coffield (the father) would cause unseemly clashes of authority between courts of equal dignity and juris-

diction; and would permit one in the midst of a lawful exercise of jurisdiction first obtained by the other, to step in and overthrow the proceedings thus rightfully instituted and lawfully carried out by the other. It seems clear that this should not be allowed and may be prevented by *certiorari* when the power usurped appears in the record. [State ex rel. v. Dobson, *supra*; State ex rel. v. Broadbush, *supra*.]

The judgment of the circuit court division presided over by Judge Buckner in the matter of *habeas corpus* is quashed. All concur.

C. S. CASNER, Respondent, v. I. SCHWARTZ, Appellant, S. J. HEATON, ET AL., Defendants.

Kansas City Court of Appeals, January 28, 1918.

1. **BILLS AND NOTES: Triplicate: Deed of Trust: Negotiations: New Issue: Rival Claimants.** C fraudulently procured a note to be executed to himself in triplicate with a deed of trust securing one note, not designating which one. He then negotiated one of the notes to a bank for a loan, then paid the loan and took up the note. Then he several different times re-negotiated the note as collateral for loans, taking it up each time, until finally he negotiated it to H, a present claimant. The day C sold and negotiated to S, the other note was in the hands of one of his various endorsees, but on the next day he took it up and held it for a time, and then continued to re-negotiate it and take it up until it reached H, the present claimant. It was *held*, that when C took up the note and re-negotiated it to H, it was a new issue by him and being subsequent to the purchase of the other note by S, it left the latter entitled to priority of the lien of the deed of trust.
2. ———: **Triplicate: Fraud: First Negotiation: Priority.** When a note is fraudulently executed in triplicate with a deed of trust securing payment of the note, the one first negotiated will be considered the real note, entitled to priority in the lien of the deed of trust.
3. ———: ———: **Negotiation: Reissue.** When the payee in a note negotiates it to an innocent purchaser and in the course of busi-

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ness again becomes the holder and again negotiates it, it is a reissue or new issue of the note.

4. ———: **Knowledge: Equities: Original Payee.** While one with knowledge of the infirmity of a note who purchases it from an innocent holder will get a good title free of equities in favor of the maker, yet this rule does not reach so far as to include the payee, who may, in the course of business, again become the owner of the note, as to him the note is subject to any defense as if it had never been negotiated by him.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn, Judge.*

REVERSED AND REMANDED (*with directions*).

Calvin & Rea for appellant.

Samuel Feller for respondent, *Casner*, and *John D. Meyers* for the defendant, *Heaton*.

ELLISON, P. J.—Plaintiff's petition is in equity whereby he seeks to have ascertained and declared which of three holders of three separate sets of promissory notes of three each, each set purporting to be secured by the same deed of trust, is entitled to priority; that is to say, which set should be considered as secured by deed of trust to the exclusion of the others.

Plaintiff has become the owner of the real estate described in the deed of trust and alleges in her petition that she paid one thousand dollars on the principal of the note for five thousand dollars, now held by Heaton and interest on two notes of five hundred dollars each. She alleges in her petition that she does not know which of the three sets of notes are the ones really secured by the deed of trust, but that if the Court finds that the notes held by Schwartz are the true notes that then the payment made and credited on the Heaton notes, as aforesaid, be credited on the Schwartz notes, and that any effort made to sell the land under the deed of trust be enjoined until such credit is made.

The trial court found in favor of the set held by defendant Heaton, whereupon defendants Schwartz and The Scarritt Bible and Training School appealed. The latter afterwards abandoned its appeal and we have to decide between Heaton and Schwartz.

These notes were thus executed in triplicate by C. M. Young and his wife. One was for \$5000, due in three years, one was for \$500, due in four years, and one was for \$500, due in five years, each payable to J. S. Chick Investment Company or order, each dated September 1, 1911, and each bearing six per cent interest.

It appears that the Chick Company held the set of notes now owned by defendant Heaton for nearly two months, when on October 21, 1911, it (through Chick) negotiated them to the Southwest National Bank of Commerce as collateral for a loan, by the following endorsement: "For value received J. S. Chick Investment Co., hereby assigns and transfers this note to ——— or order, without recourse, together with all its interest in and rights under the deed of trust securing same. J. S. Chick Investment Co., J. S. Chick, Jr., President." On October 30, 1911, Chick took them up from the bank and on November 2, 1911, he negotiated them to plaintiff Casner as collateral by same endorsement and again, on January 19, 1912, took them up; and on the same day again negotiated them to the Southwest National Bank of Commerce as collateral for another loan, and again, on March 19, 1912, he took them up, and on the same day negotiated them by same endorsement to Jobes. Then, after nearly three years, on January 28, 1915, he took them up from Jobes and on same day sold and negotiated them by same endorsement, to defendant Heaton, who now holds them.

Chick on January 18, 1912, sold and negotiated by same character of endorsement another set of the triplicate issue to Schwartz and he has held them since.

It will be noted that the notes now claimed by defendant Heaton were the first to be negotiated by Chick. They were negotiated to the bank in October, 1911, while those held by defendant Schwartz were

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not negotiated until January, 1912, that being their first transfer from Chick. So that under the rule when there is more than one issue of notes the first one is to be considered the real one secured by the deed of trust, it is clear that Heaton would have the prior right. That rule is recognized in *Southern Com. Bank v. Slattery*, 166 Mo. 620. It was expressly decided by this court in *Quinn v. McCallum*, 178 Mo. App. 241, and again in *Yeomans v. Nachman*, 198 S. W. 180.

But it will be noted that the notes finally getting to and now held by Heaton were, after their first endorsement, several times taken up by Chick and again endorsed by him to other parties. The last time they were in Chick's hands and re-negotiated by him was January 28, 1915, when he took them up from Jobes and then sold them to defendant Heaton. This was more than three years after Schwartz bought his set, which, as we have said, he still holds.

But when Chick took up the notes from his various endorsees and re-negotiated them, they, each time, became a reissue by Chick, so that when he took up the notes and again negotiated them to Jobes and then to defendant Heaton, it was a new issue (*Kelly v. Staed*, 136 Mo. 430; *Sater v. Hunt*, 66 Mo. App. 527; *Hawkins v. Weist*, 167 Mo. App. 439; *Devens v. Van Valkenburgh*, 192 Mo. App. 215), and being subsequent to the issue to Schwartz, it left the latter, in point of time, with a superior claim to the lien of the deed of trust. Being a new issue, the line of negotiation, in regular course with consequent rights of innocent endorsees, was broken and they were freed from any past negotiation and stood in Chick's hands as though never negotiated by him.

This view is supported by another rule of law, viz, that though one with knowledge of the infirmity of a note may purchase it from any innocent holder and get good title, freed from defense by the maker, "this rule does not reach so far as to include the original payee who may, in the course of business, again become the owner of the note; since he is the original wrongdoer in negotiating the note and would be liable

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over to the maker for what the latter would be compelled to pay." [Miller v. Chinn, 195 S. W. 552; Argon Coffee Co. v. Rogers, 105 Va. 51, 54; Borquin v. Borquin, 120 Ga. 115, 119; Kost v. Bender, 25 Mich. 515; Hoyer v. Kalashain, 22 R. L. 101; Comstock v. Buckley, 141 Wisc. 228, 233; Andrews v. Robertson, 111 Wisc. 334, 337, 338.] In the first of the three last cases it is said, the note "is subject to any defense that could have been made had it never been transferred at all." In the second, "When it (the note) came back to his (the payee's) hands it reassumed the same position it formerly occupied; * * *". In the third, it is said that the payee's "position is the same when he comes into possession of the paper the second time as when he first possessed it."

So we are of the opinion that Chick having sold the notes to Swartz on January 18, 1912, and on the next day (January 19th) having taken up the Heaton notes, the latter notes became as though never issued and his act resulted in protecting the Schwartz notes and giving them first place in the lien of the deed of trust—a place they could not lose by any subsequent act of Chick.

The foregoing views lead to a reversal of the judgment and remanding of the cause with directions to enter a decree for Schwartz. All concur.

M. J. KILROY, Respondent, v. FRANK BRIGGS,
Defendant, GALVESTON, H. & S. A. RAILWAY
COMPANY, Garnishee, Appellant.

Kansas City Court of Appeals, January 28, 1918.

1. **GARNISHMENT: Wages: Petition: Writ: Statements.** Before a garnishment for wages can be run against a railway company there must have been personal service on the defendant, unless the suit be brought in the county where the defendant resides, or the county where the debt accrued; and the petition and writ must affirmatively show where defendant resides and the

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cause of action accrued. If the petition and summons does not show these things, the judgment against the garnishee will be reversed.

2. ———: *Statutes Construed.* Section 2427, R. S. 1909, as amended by the Laws of 1911, p. 142, forbids the issuance of a garnishment for wages until after a judgment is rendered against the defendant, except under certain conditions therein named, to be stated in the petition. But these conditions do not meet the requirement of certain statements in the petition and summons under section 1 of the Laws of 1911, p. 142, wherein garnishment is forbidden where there is no personal service on the defendant, except under certain other conditions to be stated in the petition and writ.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,*
Judge.

REVERSED.

Watson, Gage & Watson for appellant.

M. J. Kilroy for respondent.

ELLISON, P. J.—This is an action against defendant begun before a justice of the peace to enforce the lien of a boarding house keeper for \$37.50, as given by sections 8247, 8248, Revised Statutes 1909. An attachment, in aid, was issued and the garnishee railway company was summoned to answer what, if anything, it owed defendant. It answered that it owed him \$74 for wages earned in its employ. Defendant resided in the State of Texas and he was notified by order of publication. Judgment was rendered against him before the justice by default for the amount of plaintiff's claim. Judgment was also rendered against the garnishee for same amount. The garnishee appealed to the circuit court, but defendant did not. In the latter court judgment was rendered for plaintiff against the garnishee and the latter appealed to this court.

It is provided in section 1 of the Laws of 1911, page 141, that no wages shall be attached before personal

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service is had upon the debtor defendant "unless the suit be brought in the county where the defendant resides, or in the county where the debt was contracted and the cause of action accrued." It is also provided in such statute that the "writ or summons of attachment or garnishment shall affirmatively show the place where the defendant resides and the place where the debt is contracted and the cause of action arose."

The present case fails to meet these requirements. [Music Co. v. Sage, 184 Mo. App. 340.] The suit was not brought in the county where defendant resided, for it is alleged that he lived in Texas, nor is there anything to show that the cause of action accrued in Jackson county where the action was instituted. It is alleged that plaintiff's assignor is a boarding house keeper, and a resident of Jackson county, but nowhere is it stated that the board bill was made in that county. Plaintiff could well have resided in Missouri and kept a boarding house in the nearby State of Kansas and the bill be contracted in that State; and the averment would have covered such state of facts. In an effort to meet the objections noted, plaintiff added at the foot of the statement this allegation: "Debt herein accrued in Missouri and is owing to a *bona fide* resident of Missouri. Defendant resides in Texas." This does not cure the defect. A statement that the debt accrued in Missouri is not a statement that it accrued in Jackson county, as required by the statute.

The writ issued also fails to meet the absolute requirement of the statute above quoted, in that it also recites that the "Debt herein accrued in Missouri" instead of Jackson county.

Plaintiff has ignored the statute above quoted and seems to have relied altogether upon a compliance with section 2427, Revised Statutes 1909, as amended by the Laws of 1911, page 142, reading as follows:

"Except as hereinafter provided, no garnishment shall be issued by any court in any cause where the sum demanded is two hundred dollars or less, and where the property sought to be reached is wages due the defend-

ant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action: *Provided*, this section shall not apply when the debt or claim sued for was contracted or accrued in this State: *Provided, further*, in such cases the petition or statement filed in the cause and the writ or summons of garnishment shall affirmatively show that the debt or claim sued for was contracted or accrued in this State and is owing to a *bona fide* citizen or resident of this State."

But section 1, of the other statute, first above quoted, lays down the procedure in cases of garnishment for wages where (as in this case) there is no personal service on the defendant. The section (2427, p. 142, Laws 1911) last above quoted concerns instances in which no *judgment* has been rendered prior to issuing the garnishment.

The judgment must be reversed. All concur.

THOMAS L. BRUNK, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 28, 1918.

1. **WITNESS: One Party Dead: Actions Ex Delicto: Corporation Employees.** The statute of Missouri (section 6354, R. S. 1909) refuses one party the privilege of testifying when the other party is dead; and such statute applies in actions *ex delicto* as well as *ex contractu*. And in the instance of one party being a corporation, the agent or employee who made the contract, or transacted the business, or who, while acting within the scope of his employment, committed the wrong, is taken to be the corporation, and if he is dead at the time of the trial, the other party cannot testify.
2. —: **Assault: Third Parties: Competent Witnesses.** Where an employee of a corporation, acting within the scope of his employment, assaults another and dies, the injured party who brings an action for the wrong cannot testify, and the fact that other persons witnessed and have knowledge of the altercation and are competent witnesses, will not prevent the disqualifying application of the statute.

3. ———: ———: **Two or More Employees: Death of One: Witness.**
If two employees of a corporation, acting within the scope of their employment, wrongfully assault another and one of them dies, the statute (section 6354, R. S. 1909) will not disqualify the injured party as a witness in his own behalf, since the other wrongdoer (standing as a corporation) survives and may testify.
4. ———: ———: **Conductor: Motorman: Street Car: Assault; Death.**
The conductor of a street car being operated for the company by himself and a motorman assaulted a passenger. The conductor died, and it was held that the statute (section 6354, R. S. 1909) prevented the injured party from being a witness in his own behalf, and that the fact that passengers observed the altercation, and that the motorman saw it, but took no part in it, all being competent witnesses, would not prevent the application of the statute.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn, Judge.*

REVERSED AND REMANDED.

Clyde Taylor, R. J. Higgins, Roscoe P. Conkling and Charles A. Stratton for appellant.

Milton J. Oldham and W. W. Bryant for respondent.

ELLISON, P. J.—Plaintiff's action is for personal injuries received from an assault and battery by one of defendant's street car conductors. He recovered judgment in the circuit court.

Plaintiff claims that he boarded one of defendant's street cars intending to become a passenger thereon and that he had a transfer from one of defendant's cars on another line which he presented to the conductor, who took it and tore it into two pieces, and then undertook to put plaintiff off the car. In doing so he assaulted him with his fist and inflicted injury upon him.

At the trial plaintiff was introduced as a witness in his own behalf, when, on its being shown that the conductor was dead, defendant objected to plaintiff being allowed to testify as to what occurred between him and the conductor. The objection was overruled, and plain-

tiff then testified to all that he and the conductor did in reference to his attempting to ride upon the transfer, the assault and battery following.

The statute refuses one party the privilege of testifying when the other party is dead. [Sec. 6354, R. S. 1909.] In the instance of a corporation being the other party, the agent or employee who made the contract, or transacted the business for it; or who, while acting in the scope of his employment, committed the wrong, is taken to be the corporation, and if he is dead at the time of the trial, the other party cannot testify. [Williams v. Edwards, 94 Mo. 447.]

It has been questioned whether the statute applied in actions *ex delicto* (Drew v. Railroad, 129 Mo. App. 459), but it has been decided by the St. Louis Court of Appeals that it did, (Leavea v. Railroad, 171 Mo. App. 240) and that case was approved by the Supreme Court in an opinion by Judge RAILEY. [181 S. W. 7.]

That case finds full application to the facts in this case, unless prevented by the following consideration. It was admitted that passengers were in the car and observed the altercation. It was also admitted that the car was in charge of defendant's servants, the conductor and motorman. But the motorman took no part in the controversy.

The fact that passengers were present ought not to prevent the application of the disqualifying provisions of the statute. The statute is directed towards securing equality of the parties, as such, so that if death prevents one from giving his version of the controversy, the other shall not, and its application is not arrested by the fact that third parties have knowledge of the controversy and may be called upon to testify.

Nor is the application of the statute affected by the fact that after defendant's objection to plaintiff's competency was overruled, it introduced several passengers who testified in its behalf. These persons could not fill the place of the conductor, and the fact remains that one party had the benefit of his own testimony as a par-

ticipant, while the other party was deprived of a like benefit, equality being thereby destroyed. It was no special advantage that defendant could call third persons, for plaintiff could have done the same thing. To say that when third persons observed a transaction and were used as witnesses, it rendered the other party competent, is, in effect, saying that the deceased could not have explained or thrown light on the subject, or his testimony been of any service whatever.

Plaintiff has cited *Galvin v. Knights of Matthew*, 169 Mo. App. 496, 502, 512, as sustaining his competency. The case is without application. Where the testimony of a deceased party is taken by deposition, or preserved as given at a former trial, the other party may testify, for in such instance both parties have been heard and equality is secure. [*Coughlin v. Haeussler*, 50 Mo. 126.] What was said in the *Galvin* case was thought to fall within that rule; but since the *Galvin* case is wholly unlike the one before us, we are not called upon, at this time, to say whether it did or not. In this case the conductor in his lifetime never had an opportunity in which to testify to any part of his version of the difficulty, in which he is charged with being the wrongdoer.

Neither do we think the circumstance that the motor-man, another employee of defendant, was on the car should affect the application of the statute. It is true that where two agents represent a party in a transaction and one of them dies, the statute does not apply and the other party may testify, for there is one left alive who, with the deceased, made the contract or transacted the business. [*Fulkerson v. Thornton*, 68 Mo. 468.] And so, by analogy, we think that if two employees of a person, in the course of their employment, assault and beat another, the death of one of them would not disqualify the injured party, for his joint wrongdoer may testify to his version of the affair and thus preserve the equality required by the spirit of the statute. But we do not think this would apply to employees, who merely may have witnessed the wrong, but who had no part in it. They are not, in any sense, the other party to the trans-

Plonsky v. Morrison.

action. They are not engaged in the scope of their employment, when they merely happen to observe an altercation between another employee and the injured party.

In this case it does not appear that the motorman had any part in the difficulty, or that he was present. We must presume he was in the front end of the car which was his post of duty.

We therefore conclude that the presence in the car of passengers and the nonparticipating motorman does not prevent the application of the disqualifying provision of the statute. The judgment will therefore be reversed and as plaintiff may be able to make out a case for the jury without the aid of his own testimony, we will remand the cause. All concur.

LILLIE PLONSKY, Respondent, v. A. MORRISON,
Appellant.

Kansas City Court of Appeals, February 18, 1918.

SPLITTING CAUSE OF ACTION: Justice of the Peace: Commencement of Suit: Different Demands: Maturity. All causes of action growing out of the same transaction but falling due at different dates, which are due at the institution of a suit should be included in such suit. The beginning of a suit before a justice of the peace dates from the delivery of the summons to the constable. A landlord sued his tenant from month to month before a justice of the peace for one month's rent. The summons was void and a new one was issued and judgment rendered. After filing the suit but before the new summons was issued, a second month's rent fell due. Afterwards suit was brought on the second month. Defendant defended on the ground that it should have been included in the first suit and was barred. It was *held* that it was not barred.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird*, Judge.

AFFIRMED.

Thomson & Davis for appellant.

Frank Gordon for respondent.

ELLISON, P. J.—Defendant 'rented plaintiff's property, situated in Kansas City, from month to month, the rent being due and payable to plaintiff on the 25th of each month. This action was brought before a justice of the peace for one month's rent. On appeal to the circuit court judgment was rendered for plaintiff.

The defense is that plaintiff has split her cause of action, in that when she instituted a former suit the month here sued for was due and should have been included in the other suit.

The facts are that on the 19th of February, 1916, plaintiff filed his written claim with the justice for the month's rent due the 25th of January. Summons was issued and delivered to the Constable returnable in nine days when it should have been ten. [Sec. 7420, R. S. 1909.] On discovering the error an *alias* summons was issued on the 28th of February, returnable in more than ten days, and judgment was afterwards duly rendered for plaintiff for the rent sued for and the judgment paid.

On the 11th of March plaintiff filed the present claim with the justice for the rent due the 25th of February and judgment was rendered by the justice for her. Defendant thereupon appealed to the circuit court where judgment was again rendered for her and defendant appealed to this court.

It will be observed that when plaintiff's first suit was filed for the January rent, the February rent was not due, but there being a defect in the summons a new one was issued on February the 28th, and at that date the February rent had become due. Defendant's point is that all of this rent due (January and February) when plaintiff commenced her first suit should have been included in one action. [Union R. R. & T. Co. v. Traube, 59 Mo. 355, 362.] And as the first suit before a justice of the peace is not deemed to be begun until the summons is delivered to the Constable (Sec. 7410, R. S. 1909) the first suit was not begun until the *alias* summons was

delivered to that officer, that being after the February rent had fallen due.

We are not inclined to defendant's view. For the matter of pleading, its sufficiency is judged from the date of filing of such pleading. For periods from which to start limitation and various other things, the suit would not be deemed to be commenced, within the meaning of the statute, until the summons is delivered to the constable. But, notwithstanding the statute, the filing of a statement of one's cause of action with the justice of the peace is a necessary part to the commencement of the suit (*Zanesville v. Telegraph Co.*, 64 Ohio St. 67, 83) and all matters pertaining to the cause of action stated should be judged and considered from the standpoint of the date of its deposit with the justice. So that, when the question involved is as to the necessity for including or joining one or more causes of action in a statement, it should be considered from the date of filing such statement. Plaintiff's statement of her first cause of action was complete when filed, and though the summons afterwards issued upon it was void on account of being made returnable in less time than required by the statute, the statement remained a valid record in the cause and was the foundation upon which the new summons rested, and we do not see why a cause of action falling due after its filing must be lost to the plaintiff unless inserted therein by way of amendment. We will add that this case is not an instance where the plaintiff ordered or connived at a delay in taking out a summons.

The judgment is affirmed. All concur.

THE STATE OF MISSOURI, at Relation of JOSEPH JUNGMEYER, Appellant, v. JOHN K. HUNTER et al., Respondents.

Kansas City Court of Appeals, January 28, 1918.

CONSOLIDATED SCHOOL DISTRICTS: Maintenance of Elementary Schools: Meaning of Words in Statute. In mandamus to compel

the directors of a consolidated school district to maintain an elementary school "within two and one-half miles by the nearest traveled road of the home of every child of school age within said school district," as provided in Act of March 14, 1913, Laws 1913, pp. 721, 725, where the return alleged that "relator does not live upon a highway," that an elementary school was maintained which was within the statutory distance from where the relator's children reached the highway; a demurrer to the return, which confesses the facts properly pleaded therein, was properly overruled. The statute does not mean that a schoolhouse must be maintained within two and one-half miles of any child's home, but only that the schoolhouse must not be more than that distance from the point where access to the public road is had. The fact that children do not live upon a highway but must go some distance to get to it is not a matter of consequence. That is merely their misfortune or inconvenience.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain,*
Judge.

AFFIRMED.

Calfee & Westhues for appellant.

Irwin & Haley for respondents.

TRIMBLE, J.—Respondents are the directors of Consolidated School District No. 1 of Cole County organized under the act of March 14, 1913, Laws of 1913, pp. 721-725, relating to consolidated schools. Said Act provides that in voting upon the question of consolidation the question of the transportation of pupils to and from the schoolhouse may be voted on. Section 4 of said Act provides that: "If transportation is not provided for in any school district formed under the provisions of this Act, it shall then be the duty of the board of directors to maintain an elementary school within two and one-half miles by the nearest traveled road of the home of every child of school age within said school district."

The question of transportation of children was not considered nor voted upon in the organization of said district, and relator brought this proceeding in mandamus against said directors to compel them to maintain an

elementary school within two and one-half miles by the nearest traveled road of the home of the said children.

The respondent directors filed a return setting up a great many facts some of which will be stated later. To this return relator demurred but the demurrer was overruled. Thereupon relator stood on his demurrer and appealed.

The conceded facts are that upon the formation of the consolidated school district and the erection of a high school for said district, the directors also selected a site and erected thereon a new, commodious and up-to-date elementary school building and established therein an elementary school for relator's children; that said elementary school is more than two and one-half miles distant from their home, 'being two and seventy-one one hundredths miles distant therefrom, if the public highway is used in getting to it. And the contention around which the suit revolves grows out of and is determined by, what is meant by the Legislature when it enacted that it should be the duty of the board of directors to "maintain an elementary school within two and one-half miles by the nearest traveled road of the home of every child of school age in said school district."

We do not think it is necessary for us to go into any question of what is meant by the phrase "traveled road" or to determine whether the term "road" must mean only the established county road or highway used by the traveling public generally, or whether it may be deemed to include a right of way granted in writing by the owners of intermediate lands to relator's children as a perpetual easement maintained for their use and accommodation and affording them a short and expeditious route to school of less than two and one-half miles in length. Among the facts set up in the return it is stated that such a way or easement has been created for them and that the said children have heretofore used and will continue to use such way in getting to school. And the contest between the litigants seems to have revolved entirely around the question whether such a route could be said to come within the meaning of the phrase "traveled

road" as used by the Legislature. But, in this case, as stated, we do not have to decide this contest one way or the other but can base our decision entirely upon other grounds.

The facts alleged in the return are by the demurrer confessed, or rather, in passing on the demurrer, every fact well pleaded therein is taken to be true. Now, it is alleged in the return that "relator does not live upon a public highway" and also that in order for the children "to reach a public highway it is necessary for said children to travel through fields adjoining the home of relator before reaching said public highway" and that "the distance from where said children reach or intersect a public highway to the site of said building is less than two and one-half miles even by the public road," etc.

So that, according to the return, the facts of which the demurrer admits, when the children arrive upon the public highway they are then within two and one-half miles of said schoolhouse by said road. Now, the fact that the children do not live upon the highway but must go some distance to get to it is not a matter of consequence. That is merely their misfortune or inconvenience. The Act does not require that the schoolhouse must be within two and one-half miles of every child's home. All that is meant is that the schoolhouse shall not be more than that distance from the point where access to the road is had. Any other construction would render the law unreasonable, oppressive, and in many districts impossible of being carried out.

The judgment is confirmed. All concur.

SAMUEL W. NEVINS, Appellant, v. JOHN W. COLEMAN et al., Respondents.

Kansas City Court of Appeals, January 28, 1918.

1. **EQUITY: Reformation of Deed of Trust: Judgment: Res Adjudicata: Parties Bound.** In a suit between grantor and grantee to reform a deed of trust on the ground of mistake, so that a suit for damages might be maintained under a second count for wrongfully assign-

Nevins v. Coleman.

ing said deed to an innocent holder without notice, the judgment in the foreclosure proceedings brought by such assignee without notice against the grantor was not *res adjudicata* of the question whether there was or was not a mistake in said deed, since the foreclosure judgment did not necessarily decide the question of mistake but only as to whether it should be deemed to exist as to such assignee.

2. ———: ———: ———: ———: ———: **Issues Determinable in Former Action.** In the foreclosure suit both the grantor and grantee agreed that the mistake existed and the only basis on which the grantee assisted grantor in the defense was that the assignee took the deed with notice. As between the grantor and grantee, no relief that either might have asked against the other would have been responsive to the bill for foreclosure. They were not adversaries and there was no room for an adjudication of the fact of mistake as between them. Hence one of the conditions necessary to the defense of *res adjudicata* was wanting.
3. ———: ———: ———: ———: ———: ———. When a former judgment is relied upon as *res adjudicata* of a fact in a subsequent suit, there must be no uncertainty as to whether the former judgment was based upon the establishment of that precise question of fact, else it will not be *res adjudicata* of such fact.
4. ———: ———: **Effect of Foreclosure Prior to Reformation.** The fact that a deed of trust has been foreclosed will not affect the grantor's right to correct the same as between him and the grantee so as to determine the rights still existing between them. In such case, the reformation would not affect or clash in any way with its terms and legal effect before judgment of reformation, nor affect the rights of parties purchasing under the foreclosure before the reformation.
5. **COURTS: Jurisdiction: Title to Real Estate.** A suit to reform a deed of trust after it has been foreclosed, wherein the reformation sought does not change or affect the validity of the foreclosure proceedings but only establishes some right as between the original parties to the deed, does not involve the title to real estate and the court of appeals, therefore, has jurisdiction.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,*
Judge.

REVERSED AND REMANDED (*with directions*).

Finley & Sapp for appellant.

McBaine & Clark for respondents.

TRIMBLE, J.—Plaintiff bought a house and lot of the defendant Coleman, paying a large part of the purchase price by transferring to Coleman, without recourse, a note and a deed of trust for \$2018, due November 15, 1913, given by other parties on property already encumbered. As collateral security for the payment of same note he gave Coleman his own note for \$500, due December 15, 1913, secured by a second deed of trust upon a small piece of property. On November 15, 1913, Coleman assigned both notes to one Gordon, who, in the year 1916, foreclosed the \$2018 deed of trust, and, not obtaining anything like the full amount of the debt, also foreclosed said \$500 deed of trust but obtained only a small sum of it, and thereupon, under execution on his deficiency, judgment sold other property of defendant.

The real object and ultimate purpose of this action is to recover damages of the defendant Coleman for the alleged wrongful negotiation of said \$500 note to Gordon, it being plaintiff's contention that said collateral note and deed of trust were given on condition that they were to be void if the \$2018 deed of trust was not foreclosed by December 15, 1913, but that said provision was, by mistake, left out of said collateral note and deed of trust, and that by assigning same to Gordon without notifying him of said condition, plaintiff was greatly damaged.

The petition is in two counts. The first seeks, in equity, to reform the collateral note and deed of trust on the ground of mistake in omitting therefrom the alleged agreement that they should be void if the other deed of trust was not foreclosed by the date last above mentioned. The second count is for damages accruing to plaintiff by reason of Coleman's assignment to Gordon without telling him of the condition therein, which, by reason of the mistake then existing in said note and deed of trust, did not appear on their face and was not otherwise disclosed to Gordon.

Defendant Bayless was made a party because he was the trustee in said deed of trust.

Coleman's answer to the first count after a general denial, was a plea of *res adjudicata*; that Gordon had theretofore brought a suit in the circuit court against plaintiff to foreclose said collateral deed of trust in which the question of reformation was litigated, and in which it was decreed that the note and deed of trust should not be reformed, since they were, according to the intention of the parties, *unrestricted* collateral security for the \$2018 note; and that the said collateral note and deed of trust, as drawn, truly and correctly set forth the agreement of the parties. The answer to the second count was a general denial.

Plaintiff's reply set up that defendant Coleman was not a party *plaintiff* to the suit of Gordon v. Nevins, "but on the contrary defended the same and employed attorneys for the defense of the same in behalf of this plaintiff; that said John W. Coleman was not adversary to this plaintiff under the issue in said case;" that the decision was for Gordon because he was a purchaser without notice.

The case was submitted to the court, the record on this feature reading that "this cause being called for trial, and this being an action in equity, all and singular the matters and issues herein are submitted to the court."

On the first count, the court found that said collateral deed of trust did not state the true agreement as entered into between the parties, and that the same was written under a mutual mistake of fact as alleged in the first count, but that the issues therein raised had been adjudicated in the former suit of Gordon v. Nevins tried at the April, 1914, term of said court, and, for that reason, rendered judgment for defendant on said count. The court found that the same issues were involved in the second count and that the basis of said second count was the restrictive agreement sought to be established in the first, and thereupon rendered judgment for the defendant on the second count for the same reason.

Although it is not a contested matter in the case, yet it may be well to observe that while reformation of a deed of trust on real estate is sought in the first count, yet it clearly appears on the face of the entire proceeding that the title to real estate cannot be affected and is not involved, since it has already passed, by foreclosure, to other parties and cannot be disturbed by any judgment herein. In fact, no attempt is made to affect the title, the reformation sought being only *as between plaintiff and Coleman* to establish the agreement in order that the former may sue to recover damages for the latter's alleged wrongful assignment without being confronted with a written agreement directly contrary to plaintiff's claim. There is therefore, nothing in the case to affect our jurisdiction. [Schultze v. Tatum, 96 Mo. 185; Hardwicke v. Barnes, 253 Mo. 6; Heman v. Wade, 141 Mo. 598, 601; Dubowsky v. Bingell, 258 Mo. 197; Vandergrif v. Brock, 158 Mo. 681.]

Did the issue involved in the first count become *res adjudicata*, as between Nevins and Coleman, by reason of the judgment in the suit of Gordon v. Nevins? Upon being sued by Gordon, Nevins notified Coleman that should he, Nevins, be defeated in that suit, he would hold Coleman liable, and thereupon Coleman paid half of the lawyer expense in defending said suit, and assisted Nevins in his defense by testifying in the case, but he was not a party to the record. Nevins defended in that suit on the ground that the agreement was that the collateral note and deed of trust were to be void if the other deed of trust was not foreclosed by December 15, 1913, and that Gordon was fully informed of this fact when he took the notes as assignee. And Coleman, testifying as a witness for Nevins, swore that such was the agreement between him and Nevins at the time the collateral note was given, and he further testified that he told Gordon of such fact when he assigned the notes to Gordon. The judgment, however, in *Gordon v. Nevins*, was in favor of Gordon. It recites the giving

of said \$500 note and deed of trust as collateral security for the amount represented by the \$2018 note, and authorized and directed the foreclosure thereof, without making any mention of the condition by which it was claimed the note and deed of trust were void. The judgment is worded as if no defense based thereon had been raised. We say this because, in the case at bar, it is claimed on plaintiff's side that the judgment in *Gordon v. Nevins* was in Gordon's favor because he was a purchaser without notice, while on the defendant Coleman's side it is contended that the judgment was in Gordon's favor because the court in that case found that, *in point of fact*, the note and deed of trust, as drawn, set forth the true agreement. We do not think this last mentioned claim is shown by the Gordon judgment. Nor do we agree with defendant Coleman's claim that Gordon was not in a position to invoke the benefit of a want of notice. He was, it is true, the assignee of the \$2018 note after its maturity and therefore took it with notice of any equities that might have existed between the parties to *that* note, but the \$500 collateral note was assigned to him *before* its maturity and it is only this note that is in question. Hence we cannot say that the judgment in *Gordon v. Nevins* necessarily decided that in point of fact the note and deed of trust, as drawn, correctly set forth their terms. Indeed, since both of the original parties (payor and payee), to the \$500 note were *agreeing* in the Gordon-Nevins suit, as to the existence between them of the agreement rendering the note and deed of trust void if the other deed was not foreclosed by December 15, 1913, it is almost certain that the judgment was in Gordon's favor because the element necessary to complete the defense, namely notice to Gordon, was not established. It was not necessary for Gordon to affirmatively invoke want of notice since notice was brought into the case as a necessary element of the defense. What was the cause of action or the question at issue in that suit? It was the question of *Gordon's right* to enforce foreclosure of the deed of trust and to

be paid the amount of said note. If he had no notice of any defect therein, then, as between *him* and Nevins, such defect was as if it had never been, and, therefore, the decree in *Gordon v. Nevins* directed foreclosure without alluding to any restrictive agreement and as if no defense in reference thereto had been made. In legal theory and effect the restrictive and voiding agreement did not exist *as to Gordon*, and this is all that was adjudicated by that decree. In the case at bar, the cause of action was the right of *Nevins* to have damages of *Coleman* for putting it out of *Nevins*' power to obtain the benefit of the violated agreement, and the issue is whether or not the alleged restrictive and voiding agreement existed *as between Nevins and Coleman*. In other words, whether such an agreement existed as to *Gordon*, in a suit for the enforcement of his right, was one thing, but whether it existed as to *Nevins* in a suit by him against *Coleman* is quite another thing.

Again, *Coleman* by common interest and active participation in the *Gordon* suit was on the same side as *Nevins* was, though not a party to the record. As stated, both *Nevins* and *Coleman* agreed in the *Gordon* suit that the restrictive and voiding agreement *did exist as a fact*, so that there was no room for the adjudication of any issue as between *them* even if *Coleman* had been a formal party to the record and a codefendant with *Nevins*. If he had been, and the two had filed separate answers, separate relief, as between each other, could not have been asked or granted. No relief that either might have asked against the other would have been responsive to *Gordon's* bill. [*Fulton v. Fisher*, 239 Mo. 116, 130; *Walz v. Venard*, 253 Mo. 67, 86.] Besides, any request on *Nevin's* part for relief against *Coleman* would have been inconsistent with his and *Coleman's* claim that *Gordon* had notice; while any request on *Coleman's* part for relief against *Nevins* would have been inconsistent with his testimony that the restrictive agreement did, in point of fact, exist. The matters involved in the *Gordon* suit were different

from those in the case at bar. Coleman had endorsed the \$500 note, as well as the other, to Gordon without recourse. The only liability Coleman was exposed to was liability to Nevins for failing to tell Gordon of the agreement, so that his response to Nevins' notice by participating in the defense of Gordon's suit was solely on the theory that the limiting agreement did exist in fact but that he had told Gordon of it. So that there was no room in the Gordon suit for an adjudication of the issue *as between Nevins and Coleman*, and they were not, nor could they have been, in any sense adversaries in that suit. Since they were not antagonistic to nor adversaries of each other in that suit, one of the conditions necessary to the maintenance of the defense of *res adjudicata* was wanting. [23 Cyc. 1279; *Peters v. City of St. Louis*, 226 Mo. 62, 75, 76; *City of Springfield v. Plummer*, 89 Mo. App. 515, 530; *Souther Iron Co. v. Woodruff Realty Company*, 175 Mo. App. 246; 15 R. C. L. 1013.]

The judgment in *Gordon v. Nevins* was not *necessarily* based on the court's finding that in point of *fact* the \$500 note was limited collateral. Indeed, as heretofore stated, the indications and inferences are all the other way, and there is nothing in the case at bar to show that said judgment was rested upon that ground. When a former judgment is relied upon as *res adjudicate* of a fact in a subsequent suit, there must be no uncertainty as to whether the former judgment was based upon the establishment of that precise question of fact, else it will not be *res adjudicata* of such fact. [*Russell v. Place*, 94 U. S. 606, 608; *Fritsch, etc., Machine Co. v. Goodwin Manufacturing Co.*, 100 Mo. App. 414; *New Orleans v. Citizens Bank*, 167 U. S. 371, 398.]

For these reasons we do not think the judgment in *Gordon v. Nevins* can be regarded as *res adjudicata* of the issue here. Nor does the fact that the note and deed of trust have been foreclosed as valid instruments affect plaintiff's right to establish the true agreement as against Coleman. If the object of the first count

can be strictly called reformation of these instruments, still reformation after foreclosure is not unknown to the law. [34 Cyc. 1000.] It could still be reformed *as to Coleman* from the date of the reformation without clashing in any way with its terms and legal effect before that. [Chapman v. Fields, 70 Ala. 403.]

It is manifest that the judgment for defendant in the second count was rendered solely because of the holding as to *res adjudicata* in the first. In the case as pleaded, the cause of action in the second count was made dependent upon plaintiff's success in the first. For it is clear upon the face of the pleading in the second count that plaintiff was in no position to assert that a wrong had been done him by the assignment until he had first established, in the proper manner, that the collateral note and deed of trust were in reality given upon the condition sought to be established by the first count. Therefore, even if the question of *res adjudicata* were decisive of the first count, still the court could not have rendered judgment for plaintiff in the second count on the theory (now argued by plaintiff) that no plea of *res adjudicata* was filed in that count.

It is urged by defendant that the evidence is not sufficient to establish the agreement and the mistake by which it was omitted and that the judgment for defendant on the first count can be upheld on that ground. We do not think so. The evidence of Nevins in this case is corroborated by the Notary who drew the note and deed of trust and is confirmed by the deposition of Coleman in the Gordon suit which was offered herein as an admission against him. This shows, as the court found, that the agreement was, in fact, made; and there is sufficient evidence to show it was left out by mistake.

As to the first count, the court found the fact therein sought to be established but erroneously held that plaintiff could not have judgment thereon because it had been adjudicated otherwise. The court having found the fact in favor of plaintiff, and upon sufficient

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evidence, but denied recovery on said first count upon an erroneous theory of law, it follows that plaintiff is entitled to a judgment on the first count and that a new trial should be had as to the second.

It is accordingly directed that the judgment be reversed as to both counts and the cause remanded with directions to enter up judgment for plaintiff on the first count and to award a new trial of the case on the second. All concur.

IN THE MATTER OF THE ESTATE OF MATHILDA A. LARGUE, Deceased, EDWIN S. PULLER, Executor, Respondent, v. WILLIAM RAMSEY, HARRY RAMSEY, HALLIE RAMSEY, LYNN RAMSEY and GEORGE RAMSEY, Appellants.

St. Louis Court of Appeals. Opinion Filed January 8, 1918.

1. **APPELLATE PRACTICE: Wills: Contest: Evidence: Sufficiency: Review.** Where there is no evidence of any substantial character or probative force to support the finding and judgment of the circuit court, adjudging that certain heirs contested a will and thereby forfeited their respective legacies under the will, the judgment cannot be sustained.
2. **EVIDENCE: Admissibility: Hearsay Evidence.** In proceeding to declare legacies forfeited under the will for alleged contest thereof by heirs, testimony of a third person as to statements of a legatee who actually brought the contest, but who was not a party to the instant proceeding, was inadmissible as hearsay.
3. **WITNESSES: Impeaching Own Witness.** A party cannot impeach his own witness unless tricked, and though he does not vouch for the truth of the testimony of his witness, he cannot call a witness who, as he knows will testify against him, and then impeach the witness by testimony as to contrary statements made out of court.
4. **EVIDENCE: Admissions: Conspiracy.** To render statements of one alleged co-conspirator admissible as against the other, some competent evidence must be adduced tending to establish the conspiracy.

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5. ———: ———: ———: **Admissibility.** In proceeding to forfeit legacies by reason of the heirs having contested the will, admissions of one heir, though an adverse party to the executor, while competent as against her, as admissions against interest, were not binding on the other heirs in the absence of evidence of a conspiracy.
6. ———: **Conspiracy: To Contest Will.** Where testatrix provided in will that if legatees contested the will, the legacies should be forfeited, and one legatee contested, evidence held insufficient to show conspiracy between such legatee and the others to bring a contest and avoid forfeiture of the legacies.
7. ———: ———: ———: **Burden of Proof.** Where testatrix provided by will that if any legatee directly or indirectly contested the will, his legacy should be forfeited, and one legatee contested, and the executor sought a judgment declaring a forfeiture of the shares of certain other legatees on the ground that they had participated in the contest, the burden was on the executor to prove that such legatees directly or indirectly contested the validity of the will.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. James E. Withrow*, Judge.

REVERSED AND REMANDED (*with directions*).

Edward D'Arcy and *Robert M. Wilson* for appellants.

(1) The burden of proof was on appellant in the circuit court, Puller, executor. *Hoyt v. Davis*, 21 Mo. App. 235, 237. (2) Where a plaintiff makes the defendant his witness, he vouches for his credit and cannot impeach him. *Bensberg v. Harris*, 46 Mo. App. 404, 407; *Ely-Walker D. G. Co. v. Mansur*, 87 Mo. App. 105, 112; *Dunlap v. Chemical Works*, 159 Mo. App. 49, 62; 1 Gr. Ev. (14 Ed.), sec. 442. (3) A party cannot impeach his own witness by showing statements made by him out of court contrary to his testimony at the trial, except possibly where the evidence takes the examiner by surprise. 1 Gr. Ev. (14 Ed.), sec. 444; 40 Cyc. 2559; *Dunn v. Dunnaker*, 87 Mo. 597; *King v. Insurance Co.*, 101 Mo. App. 163. (4) Even where the right of impeachment exists, it can be exercised only after calling to the attention of the witness the alleged contradictory statement made by him, and giving him

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an opportunity to explain it. *State v. Curtner*, 262 Mo. 214; 1 Green. Ev. (14 and 15 Ed.), sec. 462; *Bowman v. Coal & M. Co.*, 168 Mo. App. 703, 706-7; *Swift & Co. v. Scott*, 181 Mo. App. 1, 7-8; 40 Cyc. 2628. (5) In the absence of proof of the fact of conspiracy, the declarations of one of the alleged conspirators to a third party that a conspiracy existed, are not admissible. Such admissions are received only on the principle of agency. 1 Gr. Ev. (14 Ed.), secs. 233, 174, 176, 177; *United States v. Gooding*, 12 Wheat. 460; 8 Cyc. 683, note 88; *U. S. v. Wilson*, 60 Fed. 890. (6) This proceeding is equitable in its nature. *Whaley v. Whaley*, 50 Mo. 557; *In re Estate of Meeker*, 45 Mo. App. 186; *Bradley v. Woerner*, 46 Mo. App. 371; *Stevens v. Larwill*, 110 Mo. App. 140. The appellate court, therefore, has power to review and weigh the evidence. (7) Provisions in a will divesting an estate on condition subsequent are strictly construed, and the proof of the happening of the event should be definite and certain in order to effect a forfeiture of an estate. *Jones v. Jones*, 223 Mo. 424, 451-2.

Schnurmacher & Rassieur and Jones, Hocker, Sullivan & Angert for respondent.

(1) Respondent did not attempt to impeach any witness. All the witnesses for respondent, except the executor himself, were persons who had conspired to break the will. The Ramseys were direct parties (defendants) to the proceeding to forfeit their legacies. They were adverse parties on the record as well as adverse in interest. Their statements were, therefore, admissible on the ground (a) that they were admissions against interest (*Babb v. Ellis*, 76 Mo. 459; *Padley v. Catterlin*, 64 Mo. App. 629); and (b) that the declarations of one conspirator are admissible as to all the others. *Mosby v. Commission Co.*, 91 Mo. App. 500. (2) This is not a suit in equity. It is a motion of the residuary legatee (originating in the probate court) to distribute to her the Ramsey legacies alleged to have been forfeited because of the

Ramseys' contest of the will, which made the gift conditional on their acceptance of the will. It is one of the steps in the administration of a decedent's estate and is a statutory proceeding, hence it is an action at law—not in equity. It is not the province of a court of equity to declare forfeitures, but to prevent them. Courts of law declare forfeitures. *Trendley v. Railroad*, 241 Mo. 96. (3) The finding of fact by the circuit court in a law case is conclusive and will not be reviewed on appeal, where there is any substantial evidence to support it. *Caruth v. Richeson*, 96 Mo. 192. "An appellate court will not interfere in regard to mere weight of evidence." *Finkelnburg*, *Missouri Appellate Practice* (2 Ed.), p. 162. (4) The circuit court made a finding of fact that the Ramseys aided their sister in her contest. Deference is shown to the finding of fact of the trial judge who heard the testimony, observed the demeanor of the witnesses when testifying, and weighed their credibility. Appellate courts will not weigh the evidence in law cases. *Casey v. Gill*, 154 Mo. 181; *Van Liew v. Barrett*, 144 Mo. 509. Nor pass on conflicting evidence. *Blanton v. Dodd*, 109 Mo. 64. Even in equity cases, our appellate courts, when passing on the facts as well as the law, pay deference to the finding of the chancellor when the testimony is evenly balanced. *Benne v. Schnecko*, 100 Mo. 250. So, also, as to the credibility of witnesses. *Cox v. Cox*, 91 Mo. 71. And when the testimony is conflicting. *Erskine v. Loewenstein*, 82 Mo. 301. (5) There is ample evidence in this case to warrant the finding of the trial judge that the Ramseys conspired with their sister and Mrs. Brandenburger to contest the will. *Mosby v. Commission Co.*, 91 Mo. App. 500, 507. *Donegan v. Wade*, 70 Ala. 501. *Smithsonian Institution v. Meech*, 169 U. S. 398. *Allen v. Forsythe*, 160 Mo. App. 262, 269. *Bank v. Keeney*, 154 Mo. App. 285, 289. *Wagner v. Binder* (Mo. Sup.), 187 S. W. 1159. (6) Appellants have abandoned their contention in the circuit and probate courts that (a) the forfeiture clause of the will is invalid; (b) that

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the executor did not have the right to appeal from the order of the probate court; (c) that the Ramseys were entitled to a trial by jury. Hence no authorities on these points are cited.

STATEMENT.—This is an appeal from a judgment of the circuit court of the city of St. Louis adjudging that the appellants have forfeited their legacies under the will of Mathilda A. Largue, deceased, by reason of conduct on their part in violation of a certain clause of the will.

It appears that Mathilda A. Largue died October 12, 1909, leaving a will, executed on July 6, 1909, which was duly admitted to probate by the probate court of the city of St. Louis. By this will these five appellants, viz., William Ramsey, Harry Ramsey, Hallie Ramsey, Lynn Ramsey and George Ramsey, and their sister Sadie Feree, all of Pittsburg, Pennsylvania, are bequeathed forty-six shares of stock of the National Bank of Commerce of St. Louis, to be equally divided among them. It is said that the appellants and Sadie Feree are grandnephews and grandnieces of the testatrix. By the will are also bequeathed certain shares of stock in trust for cousins of these appellants, referred to as the "Taylor heirs;" Mathilda A. Puller, wife of respondent executor, is the residuary legatee under the will. The twelfth paragraph of the will is as follows:

"In the event that any legatee, devisee or executor, contests the validity of this will, either directly or indirectly, I do hereby revoke the legacy, devise or appointment as executor of said legatee, devisee or executor so contesting this will."

It appears that shortly after the death of the testatrix the Taylor heirs instituted a suit in the circuit court of the city of St. Louis to contest the will. After a compromise had been effected with the Taylors by Mrs. Puller, the residuary legatee, Sadie Feree, on her motion, was made a party contestant in the cause, and thereafter prosecuted the proceeding. The cause

was tried in the circuit court resulting in a verdict and judgment sustaining the will. It is said that Mrs. Feree appealed from this judgment, but that her appeal was dismissed upon an agreement between her and the residuary legatee whereby she was paid the costs and expenses incurred by her in the contest proceeding.

Thereafter a motion was filed in the probate court by the residuary legatee seeking to have the court adjudge that these appellants had forfeited their said legacies, and for an order distributing this stock to the residuary legatee, because of the fact, as alleged, that appellants had violated the twelfth clause of the will, set out above, in that they had aided and assisted in the maintenance and prosecution by their sister, Sadie Feree, of the suit to contest the will, and had thereby, directly or indirectly, contested the will.

After having heard and considered the evidence adduced, the probate court found that none of these appellants did either directly or indirectly maintain or prosecute the said suit contesting the will, and that none of them had forfeited his or her legacy thereunder, and ordered that their respective interests in the stock be transferred and set over to them by way of partial distribution.

From this judgment Edwin S. Puller, one of the two executors of the will, prosecuted an appeal to the circuit court of the city of St. Louis, where, upon a trial before the court without a jury, it was found and adjudged that each of these appellants "did aid, assist and abet Sadie Feree, the contestant of said will, in said contest," and that by reason thereof each of them violated the twelfth paragraph of the will, whereby they lost the right to participate in the distribution of the estate. And the court ordered that the stock in question be transferred and set over to the residuary legatee by the executors. From this judgment the appellants prosecute the appeal before us.

At the trial in the circuit court the respondent executors, who had appealed from the judgment of the

probate court, offered in evidence the deposition of each of the Ramseys, appellants here. In giving such deposition each pointedly and repeatedly denied any participation, directly or indirectly, in the contest.

Harry Ramsey, the cashier of a bank at Pittsburg, testified that his sister, Mrs. Feree, spoke to him about prosecuting the will contest; that he was bitterly opposed to it and would have nothing to do with it; and that he did not contribute one penny to defray the expenses of the litigation. In this connection it may be said that it appears to be conceded that the overturning of this will would have presumably rendered valid a prior will executed by the testatrix; and that in this prior will Harry Ramsey was not a beneficiary. And touching the matter of his refusal to have anything to do with the contest proceeding he said: "My principal reason for my decision was, I was not a beneficiary in the other will."

George Ramsey, a bank clerk at Pittsburg, testified that Mrs. Feree discussed with him the matter of prosecuting the will contest, and that he told her that he could not afford to lose what "was coming" to him and was entirely satisfied with the legacy bequeathed to him; that he refused to have anything to do with the proceeding and refused to contribute anything to it, and did not do so. He further testified that while the proceeding was pending he did not discuss the matter with Mrs. Feree because he "did not want to get into any argument with her about it;" that at about the time of the trial of the suit to contest the will in St. Louis, he purchased St. Louis papers for "a couple of days," for the reason that he was "interested in the matter to the extent of hoping that it would be settled up and come to an end right away;" and that there was absolutely no understanding between him and Mrs. Feree regarding a contribution to make up any loss on her part.

Lynn Ramsey, a clerk in a savings and trust company in Pittsburg, testified that Mrs. Feree talked with him by telephone regarding the contest proceed-

ing. He said: "As nearly as I can recall, she said that she was going to contest the will and asked me if I would go in with her in it. I told her no, and that was the conversation at each time;" that he flatly refused to have anything to do with the matter, and "never contributed one cent of the expenses with which she carried on the suit."

Hallie Ramsey in testifying, said: "Mrs. Feree asked me to go in with her in this contest but I always refused her, and, in fact, advised her not to carry on the suit. I thought the last will was a very just one, was really more than we had any right to expect from our aunt." She declared that she positively refused to have anything to do with the matter from the beginning; that Mrs. Feree said nothing to her about the expenses of the suit, and that she contributed absolutely nothing thereto; that Mrs. Feree proposed that all of the appellants "come in" with her, the suit to be brought in her name, and that appellants agree to make up to her her loss, if any, but that the proposition was refused.

William Ramsey testified that Mrs. Feree spoke to him several times regarding the prosecution of the will contest proceeding; that she sought his advice, which he declined to give, saying that he did not intend to have anything to do with the matter; that he positively refused to have anything to do with it, made no agreement with Mrs. Feree, and did not bear any part of the expense.

A deposition of Mrs. Jeanette Ramsey, wife of William Ramsey, was also read in evidence by the respondent executor. She testified that she heard Mrs. Feree speak to her husband about the matter in their home, asking him if he wanted to join her in the proceeding; and that he said: "I decidedly do not;" that Mrs. Feree told her that "all of her brothers were furious at her for going into the will suit."

The executor also read in evidence the deposition of Sadie Feree. She testified that she spoke to her brothers, with the exception, perhaps, of Harry, and to

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her sister Hallie, about "going in" with her in the will contest proceeding, and that "they every one refused;" that no one of them contributed one cent to the expenses, but refused to do so. She said: "They had nothing to do with the contest. They refused flatly when I asked them, so they had nothing to do with it."

As said above, the foregoing testimony was all given by way of depositions of these witnesses, which depositions were offered in evidence by respondent executor.

The executor Edwin S. Puller took the stand as a witness. Over appellants' objections he was permitted to testify to a statement said to have been made to him by Hallie Ramsey in October, 1911, after Sadie Feree had dismissed her appeal. He stated that Hallie Ramsey called at his office in the city of St. Louis and assured him that she had not in any manner participated in the will contest, and that she spoke of calling upon Mrs. Puller to tell her this; that the witness suggested to her that she ought to make a "full and frank disclosure" of all the facts in her possession concerning the participation of any of the Ramseys in the will contest, and that she replied: "I don't think I could do that. If I did that my brothers would lose their shares in the estate. . . . If I should tell what I know about this case, about my brothers' participation, I would incur their enmity," etc.

It appears Mr. Puller, who is a lawyer, was present at the time of the taking of the deposition of Hallie Ramsey in Pittsburg, but did not then question her regarding this statement. He testified that he then thought it inadvisable to do so. He further stated that in testifying before Judge Holtcamp in the probate court he referred to this statement of Hallie Ramsey; and that his recollection was that he quoted the statement to Judge Holtcamp substantially as it appears above. No record was kept of the testimony in the probate court.

The executor also read in evidence the deposition of Mrs. William H. Brandenberger, one of the Taylor heirs. Among other things, which need not be here noticed, she testified to certain conversations with Sadie Feree; and these portions of the deposition were read in evidence over the insistent objections of appellants. In the early part of the deposition, as it appears in the record, the witness states: "She (Sadie Feree) said then that her family were not taking any of the burden of the contest; she was contesting alone. If she succeeded, they were to come in for the profits; if she failed, she was to stand the loss. She did not say that they would reimburse her for her losses out of their share. No,—Oh, if she won, you mean? Why, yes, sir; I think they would. She said that the members of the family, if she lost her share, why they were to reimburse her for what was lost." Later in the deposition Mrs. Brandenberger denies that Sadie Feree said that she was to be reimbursed by the members of her family; and she stated that if she said this she was confused and did not understand the question; that Sadie Feree's "whole talk was the unfairness of the boys and their sister to want her to stand the losses, if there were any, and to share the profits in the case, . . . if there were any profits."

These appellants called Hallie Ramsey as a witness. After again testifying that she and her brothers all refused to have anything whatsoever to do with the will contest, and were opposed to having it prosecuted, she denied that she made the statement to Mr. Puller to which he testified.

Judge Holtcamp was called as a witness by these appellants. When asked if Mr. Puller made any statement before him to the effect that Hallie Ramsey had said anything to indicate that her brothers had had anything to do with the will contest, the witness said: "No, he didn't state that she had so said; his statement was to the effect rather that they had not had an interest in it so far as she knew."

ALLEN, J.—(after stating the facts as above). The question raised below as to the right of the respondent executor to prosecute the appeal from the probate court to the circuit court is not presented here by appellants and consequently need not be considered. Likewise the ruling of the circuit court refusing to allow appellants' demand for a jury, is not questioned on appeal.

Appellants take the position that the record before us is to be reviewed as a proceeding in equity, i. e. that it is our province and duty to review and weigh the evidence, and pass judgment thereupon, as in a suit in equity; while, on the other hand, respondent contends that the action is one at law, and that the judgment should be sustained if there is any substantial evidence to support it.

This is not a suit in equity, but a proceeding begun in the probate court, which court, by virtue of its statutory powers had original jurisdiction thereof. While the probate court has no jurisdiction to entertain a cause of purely equitable cognizance, nevertheless in disposing of matters coming before it, within the scope of its jurisdiction, it may properly apply the rules both of equity and of the common law. [State ex rel. v. Bird, 253 Mo. 569, 162 S. W. 119.] The controversy is one pertaining to the distribution of an estate, and we think that it is one to be determined by a course of procedure analogous to that which obtains in courts of chancery. This is the rule which our courts have long followed in regard to questions raised as to final settlements of estates; and it is held that appeals in such cases are governed by the rules applicable to appeals in equity cases. [In this connection see: In re Estate of Meeker, 45 Mo. App. 186; Bradley v. Woerner, 46 Mo. App. 371; Finley v. Schlueter, 54 Mo. App. 455; In re Estate of Danforth, 66 Mo. App. 586; In re Estate of Branch, 123 Mo. App. 1. c. 577, 100 S. W. 516; Ansley v. Richardson, 95 Mo. App. 332, 68 S. W. 609.] We perceive no

good reason why this rule should not here apply; but we deem it unnecessary to definitely pass upon that question. If we are to review the evidence and draw our own conclusion therefrom, as in a suit in equity, the appeal may be very quickly disposed of by saying that the evidence overwhelmingly preponderates in favor of these appellants, necessitating a reversal of the judgment. On the other hand, conceding, *arguendo*, that the case is to be reviewed here as one at law, we are firmly convinced that, after eliminating certain testimony which, we hold, must be cast aside as having been improperly admitted, there is no evidence of any substantial character or probative force, to support the finding and judgment of the circuit court.

We take up, then, the assignments of error which pertain to the admission of the testimony to which we have just referred.

That the testimony of Mrs. Brandenberger, in her deposition offered by respondent as to the statements said to have been made to her by Sadie Feree, was incompetent, we think cannot be doubted. Sadie Feree was not a party to the proceeding. It is said that her legacy had been declared forfeited by the probate court, and that she abided that ruling. In any event she was not a party to this proceeding at any stage, so far as the record discloses. The testimony as to her statements—whatever weight might properly be given thereto, if competent—was hearsay, and was consequently inadmissible unless it can be said to fall under some exception to the hearsay rule. That respondent could not make it competent by first introducing the deposition of Sadie Feree and then undertaking to impeach her by these contrary statements said to have been made by her out of court, we think is obvious.

A party is not entitled to impeach his own witness by showing that the witness has made contrary statements out of court, with the qualification or exception that one may be permitted to do so where, by some trick or artifice, he has been misled or entrapped into

calling the witness. [See *Dunn v. Dunnaker*, 87 Mo. 595; *Beier v. Transit Co.*, 197 Mo. 215, 94 S. W. 876; *Carp v. Insurance Co.*, 203 Mo. 295, 101 S. W. 78; *State v. Shapiro*, 216 Mo. 359, 115 S. W. 1022; *King v. Phoenix Ins. Co.*, 101 Mo. App. 163, 76 S. W. 55; *Lewis v. Railroad*, 142 Mo. App. 1. c. 585, 121 S. W. 1090.] While one does not vouch for the truth of the testimony of his witness, in the sense that he is absolutely concluded thereby (*Lewis v. Railroad*, *supra*, 1. c. 597; *State v. Shapiro*, *supra*, 1. c. 370), he cannot make available hearsay testimony by calling a witness who, as he knows, will testify against him—or offering the deposition of such a witness, as here—and then offering to impeach the witness by testimony as to contrary statements made out of court.

As to the contention that Sadie Feree and these appellants—and also the Taylor heirs—were co-conspirators, and that the declarations of one were admissible against the other, we need only say that before such declarations are admissible some competent evidence must be adduced tending to establish the conspiracy. [See *Mosby v. Commission Co.*, 91 Mo. App. 500.]

As to the testimony of respondent executor regarding the statement said to have been made to him by Hallie Ramsey, this too was an attempt to impeach respondent's witness by statements of the witness out of court. However, since Hallie Ramsey was an adverse party, her statements out of court, if any, were competent as against her, as admissions against interest. But there is no contention that she at any time said anything prejudicial to her own interests. According to respondent's testimony, Hallie Ramsey said nothing to him to indicate that she participated directly or indirectly, in the will contest but absolutely denied such participation. And in the absence of some independent evidence, having some probative force and value, tending to establish the conspiracy charged, this declaration said to have been made by Hallie Ramsey—whatever might be its worth otherwise—is not binding upon or admis-

sible against her brothers, as being the declaration of one of several alleged conspirators.

Disregarding the testimony above held to be inadmissible, we perceive nothing in the record to establish the alleged conspiracy, or to sustain the judgment below. In behalf of respondent it is urged that a conspiracy need not be shown by direct and positive proof, but may be inferred from facts and circumstances appearing in evidence. This we readily concede. But we have searched this record in vain for anything that, in our opinion, fairly and legitimately suffices to support an inference that any of these appellants did take part, directly or indirectly, in the will contest proceeding. Their participation therein cannot be inferred from the mere fact that they are the brothers and sister of the contestant Sadie Feree. Respondent says: "The very fact that each and every Ramsey repudiates connection with the contest or co-operation or arrangement with Sadie Feree in almost the identical words, is of itself a suspicious circumstance that may be considered. The court will find a remarkable resemblance in the very words used by each of the Ramseys while denying connection with the contest." But after having carefully read and considered the depositions of these appellants, we are not impressed by this argument. Neither do we perceive any merit in the argument that the fact that one or more of these appellants refrained from inquiring of Sadie Feree as to the suit, and purchased St. Louis newspapers to ascertain the result of the trial, tends to prove a participation in the contest proceeding.

Upon the residuary legatee, or the respondent executor in the circuit court, rested the burden of proving that appellants directly or indirectly contested the validity of the will in violation of the twelfth clause thereof. This burden we think was not successfully carried. Appellants do not here question the validity of this clause of the will, but say that since it provides for a forfeiture it ought to be strictly construed. [Jones v. Jones, 223 Mo. 425, 123 S. W. 29.] Its terms do not

appear to be of doubtful meaning. It provides for the forfeiture of any legacy only in the event that the legatee shall directly or indirectly contest the will. It therefore devolved upon the residuary legatee, or the respondent executor in the circuit court, to adduce some competent evidence of a substantial character tending to show such conduct on the part of these appellants as amounted to a contesting of the will by them, directly or indirectly, before their legacies could rightfully be forfeited. Nothing short of this would have sufficed. Evidence merely tending to make it appear that these appellants, or any of them, cherished a desire that Sadie Feree prevail in her suit, would not alone have been sufficient to bring them under the ban of this clause of the will, provided they did nothing to instigate the proceeding, kept aloof therefrom and did nothing to aid or further the prosecution thereof. It may well be assumed that Harry Ramsey did not desire a contest, as it was to his interest to have the will sustained. And if it can be said that there is any evidence tending to show that the other appellants, or any of them, looked favorably upon Sadie Feree's suit, all of the competent evidence goes to show that they advised against it, refused to have anything to do with it and did not further its prosecution either by any combination or agreement with Sadie Feree or by contributing to the costs and expenses thereof. In our judgment the evidence in this record wholly fails to afford any support for the judgment of the circuit court.

It follows that the judgment should be reversed and the cause remanded, with directions to the circuit court to enter judgment in favor of these appellants and to duly certify the same to the probate court. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

SYLVESTER VORMEHR AND EMILY VORMEHR,
Respondents, v. KNIGHTS OF THE MACCABEES
OF THE WORLD, Appellant.

St. Louis Court of Appeals. Opinion Filed January 8, 1918.

1. **APPELLATE PRACTICE: Review: Verdict.** In an action on a fraternal benefit certificate, the defense being suicide, *held* that under the evidence a judgment for plaintiffs could not be reversed on the ground that the verdict for them was so manifestly against the weight of the evidence as to suggest passion, prejudice, or partiality.
2. **INSURANCE: Fraternal Insurance: Defense of Suicide: Burden of of Proof.** In an action on a fraternal benefit certificate, which provided the contract should be void if insured died by his own hand, the burden was on the society to sustain such affirmative defense set up by it.
3. ———: ———: **Presumption Against Suicide.** Insured's parents, his beneficiaries, were entitled to the benefit of the presumption which the law indulges against suicide; a very strong presumption, not easily overthrown.
4. ———: ———: **Death by Suicide: Question for Jury.** Where the evidence tends to show the presence of cyanide of potassium in the stomach of deceased, and that death resulted therefrom, and no showing by defendant of suicidal intent, while plaintiffs' evidence tends to show the absence of such intent, *held* a question for the jury.
5. ———: ———: **Admission of Beneficiaries as to Suicide: Conclusiveness.** In an action against a fraternal society on its benefit certificate for a death, plaintiffs, beneficiaries, were not concluded by an admission of insured's suicide contained in the proofs of death; such admission being *prima facie* only, subject to explanation and to be overcome by evidence tending to impair its effect, while the undisputed testimony showed that the question in the proofs of death was not asked the beneficiaries by the notary who filled in the answer from his own knowledge of the coroner's verdict.
6. ———: ———: **Action on Certificate: Instruction: Burden of Proof.** In such action an instruction that, in determining whether insured died by his own hand, the jury should not speculate or guess as to whether or not he did die by his own hand, but that, unless defendant had proved by a preponderance of the evidence that accused did so die, verdict should be for plaintiffs, was not erroneous, as leading the jury into the realm of speculation and conjecture.

Appeal from the Circuit Court of the City of St. Louis.
—*Hon. Leo S. Rassieur*, Judge.

AFFIRMED.

R. P. & C. B. Williams for appellant; *D. D. Aitken* of counsel.

(1) Where the verdict of the jury is so manifestly against the weight of the evidence as to suggest passion, prejudice or partiality, the appellate court will not hesitate to order it set aside where the trial court has failed in its duty so to do. *Harper v. St. Louis & San Francisco R. R. Co.*, 168 Mo. App. 296, 172 S. W. 55; *Garrett v. Greenwell*, 92 Mo. 125; *Spohn v. Railroad Co.*, 87 Mo. 74; *Whitsett v. Ransom*, 79 Mo. 258; *State v. Primm*, 98 Mo. 372; *Baker v. Stonebraker*, 36 Mo. 345; *Price v. Evans*, 49 Mo. 396; *Lehnick v. Street R. R. Co.*, 118 Mo. App. 611; *Chitty v. Street R. R. Co.*, 148 Mo. 64; *Mann v. Weiss*, 185 Mo. 335, 170 S. W. 355; *Smith v. Mystic Workers*, 196 S. W. (Mo. App.) 62; *Caruth v. Richeson*, 96 Mo. 192; *Spiro v. Transit Co.*, 102 Mo. App. 250; *Richey v. Modern Woodmen*, 163 Mo. App. 235; *Gilmore v. Modern Brotherhood*, 186 Mo. App. 445. (2) Defendant's demurrer to the evidence at the close of the whole case should have been sustained, because the evidence of defendant and plaintiffs showed overwhelmingly that the assured committed suicide, and because of the admission of the beneficiaries in the proofs of death that the cause of death was suicide, such admission not being relieved by any reasonably sufficient explanation. *Smith v. Mystic Workers*, 196 S. W. (Mo. App.) 62; *Castens v. Supreme Lodge, Knights and Ladies of Honor*, 190 Mo. App. 57; *Stephens v. Metropolitan Life Ins. Co.*, 190 Mo. App. 679; *Richey v. Modern Woodmen*, 163 Mo. App. 235; *Ageu v. Insurance Co.*, 80 N. W. (Wis.) 1020; *Gilmore v. Modern Brotherhood*, 186 Mo. App. 445. (3) Where the beneficiary sends in to the home office of the company proofs of death, which have attached thereto an affidavit or statement of a third party as to the cause or manner of death, this is binding on the beneficiary as an admission

and preludes recovery. *Castens v. Supreme Lodge, Knights and Ladies of Honor*, 190 Mo. App. 57; *Stephens v. Metropolitan Life*, 190 Mo. App. 679. (4) It was misleading, prejudicial and erroneous to tell the jury, as was done in plaintiff's instruction No. 1, that in determining whether or not the assured's death was caused by suicide, the jury should not speculate or guess. *Peperkorn v. St. Louis Transfer Co.*, 171 Mo. App. 709; *State ex rel. v. Ellison*, 268 Mo. 239, 187 S. W. 23.

Joseph Reilly for respondents.

In the case at bar, the burden of proof was on the appellants to show that the deceased intentionally and willfully took the cyanide of potassium to destroy his life. As there was no evidence introduced at the trial to show this fact, the jury were justified in finding against suicide. If the insured died from accident or disease, or even murder, they are liable for the payment of the certificate to the beneficiaries. The presumption of law is against self destruction. In the absence of proof that the deceased committed suicide this presumption holds good. *Almond v. Woodmen of the World*, 133 Mo. App. 382; *Claver v. Woodmen of the World*, 152 Mo. App. 155; *Norman v. U. C. T.*, 163 Mo. App. 175.

ALLEN, J.—Defendant is a fraternal beneficiary association, incorporated under the laws of Michigan and duly authorized to do business in this State as such an association. The action is one on a benefit certificate in the sum of \$1000, issued by defendant to Albert S. Vormehr, plaintiffs' son, on February 25, 1908, wherein the plaintiffs are beneficiaries. The application of the assured, made a part of the contract between him and defendant, contained the following provision: "I also agree that should I die by my own hand, whether sane or insane at the time, this contract shall be null and void and of no binding force." The assured died on March 23, 1914; and after filing proofs of death, and upon defendant's refusal to pay the amount stipulated in the certificate, plaintiffs instituted this action.

The petition is in the usual form. The answer, among other things, avers that the assured died by his own hand, "having administered or taken a dangerous drug known as cyanide of potassium," by reason whereof all rights under the benefit certificate became forfeited. This is put in issue by the reply.

The trial, before the court and a jury, resulted in a verdict and judgment in plaintiffs' favor for the amount of the benefit certificate, with accrued interest; and the case is here on defendant's appeal.

The evidence discloses that the assured, a young man about twenty-seven years of age, resided with his parents, the plaintiffs herein, in the city of St. Louis. It appears that on the afternoon of March 23, 1914, he was alone at the plaintiffs' home, and, it seems, had been lying upon a couch. His body was found upon the floor under circumstances indicating that he had fallen from the couch. A physician, Dr. Labarge, was called, who found that the assured was dead and summoned the coroner. A post-mortem examination was made by the "autopsy physician to the coroner," Dr. Hachdorfer, who testified that the condition of the stomach and its contents indicated the presence of cyanide of potassium, and that in his opinion the assured died from the poisonous effect of that deadly drug. Likewise Dr. Labarge testified that the "bluish color" of the face of the deceased, which he observed, indicated—almost infallibly—death from cyanide of potassium.

No cyanide of potassium or other poisonous drug was found upon the body or about the premises; nor was anything found which had contained any such drug. In fact nothing was discovered in connection with the death tending to cast any further light upon the matter.

The testimony for plaintiffs, in rebuttal, went to show that the assured "was always in good spirits," and that he was never known to express any intention of committing suicide. His mother, Emily Vormehr, one of the plaintiffs herein, testified her deceased son had been in good health; though on cross-examination she admitted that she had testified at the coroner's in-

quest that he had "often complained about his stomach and often complained about having a pain in his side."

Dr. Labarge testified that he had prescribed for the assured, four or five years before the latter's death, for stomach trouble; but that the ailment was "nothing serious." He said that the young man was sometimes cheerful and sometimes depressed, but had never, in his presence, made any reference to committing suicide.

A witness, a saloon keeper, testified that the assured was in his saloon on March 23, 1914, between ten and eleven o'clock in the forenoon of that day, and said that he would return that evening; that the assured complained that he had had a "very bad night," said that he was taking medicine and that he was then leaving "to go to the doctor."

A witness, a friend of the assured, testified that he saw him about noon on March 23, 1914, and made an appointment with him to go a place of amusement that evening. And another witness, who had known the assured intimately for many years, testified that he was always of a very happy disposition and had "never said anything about being tired of living or committing suicide."

Defendant offered in evidence the proofs of death which had been sent to its home office by plaintiffs when laying claim to the amount named in the benefit certificate. These proofs of death, include as a part thereof an affidavit of plaintiffs wherein appear the following question and answer, viz: Q. "Immediate cause of death?" A. "Suicide." Plaintiff Emily Vormehr testified that when this affidavit was prepared in her presence by a notary, she was not asked this question and did not state that the assured died by suicide. And the notary public who filled out the paper, and before whom the oath was made, testified that he did not ask either of the plaintiffs this question, but filled in the answer, as it appears, because of the fact that he knew that the verdict of the coroner was that the deceased committed suicide. The proofs of death also contain a certificate signed and sworn to by the "commander" and

the "record-keeper" of the local order. Among other things it is recited therein that the "deceased died of suicide."

It is argued, for one thing, that the verdict is so manifestly against the weight of the evidence as to suggest passion, prejudice or partiality; and that for this reason we ought to interfere, though the trial court refused to set the verdict aside and grant a new trial. But we regard it as quite clear that we cannot reverse the judgment on this ground.

Appellant earnestly contends, however, that its demurrer to the evidence, interposed at the close of the whole case, should have been sustained because (1) the evidence "showed overwhelmingly that the assured committed suicide," and (2) "because of the admissions of the beneficiaries in the proofs of death that the cause of the death was suicide, such admissions not being sufficiently relieved by any explanation." Of these in their order:

The burden was, of course, upon defendant to sustain the affirmative defense which it set up. Furthermore, plaintiffs were entitled to the benefit of the presumption which the law indulges against suicide, a very strong presumption not easily overthrown. The evidence adduced concerning the cause of the death of the assured went no farther than to show that death resulted from the poisonous action of cyanide of potassium. There is ample evidence tending to show the presence of cyanide of potassium in the stomach of the deceased, and that death resulted therefrom. Nothing, however, directly appears as to how the cyanide of potassium came into deceased's stomach, whether taken by him with suicidal intent or through some accident or inadvertence. There is little, if indeed anything, in the evidence adduced tending to show a suicidal intent; while the evidence of plaintiffs tends with no inconsiderable force to show the absence of such intent. Under these circumstances the case was manifestly one for the jury—unless it be that plaintiffs are concluded by an admission or admissions contained in the proofs of death, as is

contended. This is in keeping with the rule of decision in this State, established by a long line of cases.

As to the admissions in the proofs of death, appellant places much reliance upon the decisions of this court in *Castens v. Supreme Lodge Knights & Ladies of Honor*, 190 Mo. App. 57, 175 S. W. 264, and *Stephens v. Metropolitan Life Ins. Co.*, 190 Mo. App. 679, 176 S. W. 253. But we think that these authorities do not support the position of appellant's learned counsel, in view of the particular facts of this case. It is true that in the cases cited admissions contained in the proofs of death were held to be binding and conclusive upon the beneficiaries, where nothing whatsoever appeared, either in the proofs of death themselves or in the evidence adduced in the case, tending in anywise to repel or impair the force and effect thereof. But it cannot be disputed that admissions so made are *prima facie* only, and are not only subject to explanation but may be overcome, as a matter of fact, by evidence in the case tending to impair the effect thereof. [*Bamberge v. Supreme Tribe Ben Hur*, 159 Mo. App. 102, 139 S. W. 235; *Bruck v. Hancock, Mutual Life Ins. Co.*, 194 Mo. App. 529, 185 S. W. 753.] In the case before us the admission appearing in the affidavit of plaintiffs, filed as a part of the proofs of death, is explained by undisputed testimony showing that the question as to the immediate cause of death was not asked by the notary, but, on the contrary, that he filled in the answer thereto from his knowledge of the coroner's verdict. As to the certificate filed by the commander and the record-keeper of the local order (who evidently had no personal knowledge respecting the cause of death, but proceeded upon hearsay only), whatever effect it may be proper to give to statements therein contained, by way of admissions of plaintiffs against interest, by reason of the fact that plaintiffs, perforce, filed proofs of death in which such certificate was incorporated, we regard it as entirely clear that the force and effect of any such admission was so far impaired by the evidence in the case as to make the question as to the cause of death one for the jury. As said

above, not only was the burden upon defendant to sustain its affirmative defense, and to overcome the presumption against suicide, but there is evidence having a tendency to show that the assured did not commit suicide. And under the circumstances it was for the jury to determine what effect should be given to any statements in the nature of admissions contained in the proofs of death. [See *Bamberge v. Tribe of Ben Hur*, supra; *Bruck v. Life Ins. Co.*, supra.]

We think the court did not err in refusing to take the case from the jury.

The giving of an instruction for plaintiffs, plaintiffs' instruction No. 1, is assigned as error, upon the ground that the instruction, among other things, told the jury that the burden of proving that the insured died by his own hand was upon the defendant, and that in determining the matter the jury "should not speculate or guess as to whether or not he did die by his own hand," but unless defendant had proved to the satisfaction of the jury by a preponderance of the evidence that the assured did die by his own hand, then the verdict should be for plaintiffs.

It is argued that the instruction, though apparently telling the jury not to indulge in speculation and conjecture, was in fact an invitation to them to do that very thing. We think the matter need not be discussed at length, for we regard it as entirely clear that the instruction could not have had the effect of leading the jury into the realm of speculation and conjecture. The situation presented is unlike that which was present in *Peperkorn v. Transfer Co.*, 171 Mo. App. 709, 154 S. W. 836, where we said that the instruction under consideration was properly refused. And we think that the decision in *State ex rel. v. Ellison*, 268 Mo. 239, 187 S. W. 23, is here without application.

It follows that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

R. S. HOWARD COMPANY, Appellant, v. INTERNATIONAL BANK OF ST. LOUIS, Respondent.

St. Louis Court of Appeals. Opinion Filed January 8, 1918.

1. **BILLS AND NOTES: Checks: Bankruptcy: Proving Claims.** Where plaintiff received a note in the course of business, and negotiated it, and afterwards sent a check to maker with the notation, "To be used in part renewal of note," and maker indorsed and deposited check in defendant bank, checked against it, failed to renew the note, went into bankruptcy, and plaintiff was required to take up the note, *held* in a suit against the bank for the recovery of proceeds of the check, that plaintiff could not recover.
2. ———: ———: **Negotiability: Restriction: Statement of Transaction which Gives Rise to Instrument.** Notation on back of check "To be used in part renewal of note," did not destroy its negotiability, but was a statement of the transaction which gave rise to the instrument within Rev. St. of Mo. 1909, section 9974, providing that such a statement does not render a promise to pay conditional.
3. ———: ———: **Deposit: Effect.** Where plaintiff sent check, endorsed, "To be used in part renewal of note," payable on its face to a depositor of a bank, which bank accepted it with the depositor's endorsement in the usual course of its banking business, giving credit to the payee for the amount, the bank became a bona-fide holder and purchaser for value.
4. **BANKS AND BANKING: Deposits: Application on Debts: Effect.** Where plaintiff sent check, with notation, "To be used in part renewal of note," to a third person, who deposited the check with defendant bank, the bank's action in thereafter charging the account of the third person with the amount of two other notes which the bank had previously discounted, and which had been dishonored, did not affect defendant bank's right to retain the proceeds of the check.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. Leo S. Rassieur, Judge.*

AFFIRMED.

John A. Blevins for appellant.

(1) The check for \$1398.60, containing the words "to be used in part renewal of note due 6/21," was notice to the bank that said check was not to be used to pay Bollman Bros.' indebtedness to the bank. They were notice to the bank that the check was to be used for a certain purpose only, and that the authority of Bollman Bros. was limited. *Johnson v. Harrison*, 177 Ind. 240; *In re Hallet L. R.*, 13 Chan. Div. 696; *Central Nat'l Bank v. Life Ins. Co.*, 104 U. S. 54; *Buckner v. Jones*, 1 Mo. App. 538; 1 *Randolph on Commercial Paper*, sec. 388; *Breese v. Crumpton*, 121 N. C. 122. (2) The bank took the check with notice that it was the property of plaintiff and was to be used for a certain purpose and could not appropriate the proceeds thereof to its own use. *Missouri Pacific Ry. Co. v. Levy*, 17 Mo. App. 505; *Wolfe v. State*, 79 Ala. 201; *Morse on Banking*, sec. 317; *Johnson v. Bank*, 56 Mo. App. 263. (3) The defendant took the check, subject to the equities between the plaintiff and Bollman Bros. The words in the check were at least sufficient notice to put the defendant upon inquiry, which would have disclosed all the details with respect to the renewal of said note and the rights of the parties. *Bank v. Edwards*, 243 Mo. 566; *Leonard v. Latimer*, 67 Mo. App. 136; *Mayer v. Bank*, 86 Mo. App. 429; *Clifford Banking Co. v. Donovan*, 195 Mo. 288.

Collins, Barker & Britton for respondent.

(1) The notation on the face of the check did not destroy its negotiability, was not in restraint of negotiation, and did not constructively charge respondent with notice. *Negotiable Instruments Act of Missouri of 1909*, p. 700, sec. 3; *Jennings v. Todd*, 118 Mo. 303; *Stilwell v. Craig*, 58 Mo. 24; *Siegel v. Chicago Trust & Savings Bank*, 131 Ill. 569; *Bank of Sherman v. Apperson Co.*, 4 Fed. Rep. 25; *Duckett et al. v. National Mechanics Bank*, Maryland Court of Appeals, 39 L. R. A. 84. (2) The notation on the check shows the transaction

out of which the instrument arose and did not destroy its negotiability or put any duty on respondent to inquire concerning the same. *Ayers v. The Farmers & Merchants Bank*, 79 Mo. 421; *Kavanaugh v. Bank*, 59 Mo. App. 547; *Bank v. Refrigerating Co.*, 236 Mo. 407. (3) The notation made on the check was for the convenience of the maker to show the nature of the credit and was a direction to the Bollman Brothers showing the manner in which the proceeds should be credited, and did not furnish any notice to respondents. *Mayer v. Bank*, 86 Mo. App. 422; *State National Bank of Springfield v. Dodge*, 124 U. S. 333; *Duckett et al. v. National Mechanics Bank*, *supra*; *First Denton Nat'l Bank v. Kenney*, 116 Md. 24; *Mercantile Trust Co. v. Donk*, 178 S. W. 113, 115. (4) The respondent was a bona fide holder for value of the Howard check. *Kavanaugh v. Bank*, 50 Mo. App. 547; *Ayers v. Farmers & Merchants Bank*, 79 Mo. 421; *Bank v. Refrigerator Co.*, 237 Mo. 407. (5) The notation on the face of the check has reference to some future act to be done by the payee as agent for the maker and does not affect the negotiability of the instrument. *Siegel v. Chicago Trust & Savings Bank*, 131 Ill. 569; *Jennings v. Todd*, *supra*. (6) Appellant elected to hold Bollman Brothers Piano Company, thereby waiving its rights, if any, to make a claim against respondent on account of the transaction in question. *Tierman's Extr. v. Security Bldg. & Loan Ass'n*, 152 Mo. 135; *Nanson v. Jacob*, 93 Mo. 331, 345; *Armsby v. Dearborn*, 116 Mass. 386.

ALLEN. J.—This is an action to recover, as for money had and received, the proceeds of a check for \$1398.60, executed by the plaintiff to the order of "Bollman Bros.," and which came into the hands of the defendant bank under circumstances to be stated below. The trial, before the court without a jury, a jury having been waived, resulted in a judgment for defendant, from which plaintiff prosecutes the appeal before us.

The evidence discloses that on February 21, 1913, the Bollman Bros. Piano Company (hereinafter referred

to as the Bollman Company), a corporation engaged in business in the city of St. Louis, executed to the plaintiff corporation, a wholesale dealer in New York City, a note for the sum of \$1656, due June 21, 1913. It appears that these two companies had had business relations for many years prior to the time of the transactions here involved. This note was discounted by plaintiff at a bank in the city of New York, and in due course it was forwarded to a trust company in the city of St. Louis, where, on and prior to June 16, 1913, it was held for collection. On June 14, 1913, plaintiff mailed to the Bollman Company its check for \$1398.60, being the check in controversy, upon the agreement or understanding between the two companies that the Bollman Company would take up the note held at the trust company, utilizing therefor the proceeds of the check and further funds of its own, and execute another note to plaintiff for \$1400. This check was in the following form:

“No. 11989. New York City, June 14, 1913.
THE NEW YORK COUNTY NATIONAL BANK.
Pay to the order of Bollman Bros.
To be used in part renewal of note due 6/21.
Thirteen hundred ninety-eight 60/100.....Dollars
R. S. HOWARD COMPANY,
R. S. HOWARD, Pres't. & Treas.”
\$1398.60.

The Bollman Company was then a depositor in defendant bank; and upon receiving this check that company, on June 16, 1913, indorsed the same and deposited it to the company's account with the bank, the check being a part of a deposit of \$2163.95 made by the Bollman Company on that day, consisting of \$100 in cash, twenty-nine small checks and the check in controversy. The evidence shows that defendant credited the Bollman Company with the total amount of this deposit, against which that company was allowed to draw checks; and that thereafter the check in controversy was duly collected by defendant through the usual banking channels.

On the day of that deposit checks of the Bollman Company were paid by defendant amounting to \$156.05 leaving a balance of \$4758.29 in that company's account at the close of the business day. On the next day, June 17, the Bollman Company deposited \$436.50, and defendant paid the company's checks aggregating \$2552, leaving a balance of \$2642.79 in the account. On June 18, the Bollman Company deposited \$1968.40, and defendant paid its checks aggregating \$1345.81, leaving a balance of \$3265.38 in the account. On June 19, the Bollman Company deposited \$1500.79, and defendant paid its checks aggregating \$510, leaving a balance of \$4256.17. On June 20, no deposit was made by the Bollman Company; on that day defendant charged the account with certain checks drawn by the Bollman Company and paid by defendant, and also with the amount of two notes of \$1500 each, being notes which defendant had previously discounted for the Bollman Company and which had been forwarded to Chicago, Illinois, but which had been dishonored and returned to defendant. On that evening the balance in this account was \$126.33. Shortly thereafter the account was transferred to another bank. The Bollman Company did not carry out its agreement or understanding with plaintiff in regard to effectuating a renewal of the note of \$1656, due June 21, 1913, and plaintiff was required to take it up from the bank at which plaintiff had discounted it. Soon thereafter the Bollman Company became a bankrupt.

There is testimony for plaintiff to the effect that subsequent to the transaction to which we have referred above, the president of the defendant bank, in conversation with plaintiff's counsel, admitted that defendant collected the check in controversy and applied the proceeds thereof to the payment of a debt due defendant from the Bollman Company. Further testimony of the witness, however, shows that in this conversation plaintiff's counsel was told that the check came into defendant's hands by being deposited in the Bollman Company's account.

The court, having refused certain declarations of law offered by plaintiff, gave six declarations offered by defendant. The first of these is a peremptory declaration that under the law and the evidence plaintiff cannot recover. We may say that other declarations of law given indicate that the court proceeded upon the theory that the notation upon the check, viz. "To be used in part renewal of note due 6/21," did not destroy the negotiability of the instrument, "or put any duty upon defendant to inquire concerning the same;" and that defendant became a bona-fide holder of the check for value.

The sixth declaration of law is as follows: "The court declares the law to be that if plaintiff proved up a claim against the bankrupt estate of Bollman Brothers Piano Company, covering the amount here claimed, then plaintiff cannot recover."

We think it obvious that the sixth declaration of law, *supra*, was unwarranted under the facts of the case, as learned counsel for plaintiff, appellant here, contends. It appears that plaintiff did file a claim against the estate of the Bollman Company in bankruptcy based upon the original note, which, as said, was not taken up by that company as contemplated; but it does not appear that plaintiff ever filed a claim against the bankrupt estate covering the item evidenced by this check. Obviously the argument advanced and the authorities cited by learned counsel for respondent in this connection are here without application. Since the original note was never paid, and plaintiff was required to account therefor to its bank in New York, where the paper had been discounted, it was, of course, the basis of a valid claim against the estate of the bankrupt, wholly independent of any claim which plaintiff had, or may now have, against anyone, as for a recovery of the proceeds of the check in controversy. By the immediate transaction here involved, plaintiff simply advanced a further sum of \$1398.60 for which, so far as the record discloses, plaintiff has received nothing.

It remains to be seen, however, whether the evidence warrants a recovery by plaintiff of the proceeds of this check from this defendant. This is the real question before us. If plaintiff made a prima-facie case then the trial court not only fell into error in giving this sixth declaration of law, but erred in giving the peremptory instruction or declaration. [Goodyear Tire & Rubber Co. v. Ward, et al., 197 Mo. App. 286, l. c. 292, and cases there cited, —S. W.—.] On the other hand, if the evidence is not such as to warrant a recovery herein by plaintiff upon any theory, then the judgment below must be affirmed.

The theory of plaintiff's learned counsel, in substance, is that by the notation upon the check, supra, the payee therein named, the Bollman Company, was invested with a limited agency or authority to use the proceeds thereof only for the specific purpose of effectuating a renewal of the note mentioned; that this notation "was notice to the defendant bank that said check was to be used for a special purpose, and of the agency and authority of Bollman Bros. Piano Company," or at least sufficed to put defendant upon inquiry as to the true facts; and that under the circumstances shown in evidence, defendant must be held to have wrongfully appropriated the proceeds of the check to its own use, whereby it became liable to plaintiff therefor, as for money had and received.

It would unduly extend and encumber the opinion to discuss the various authorities cited and relied upon by plaintiff. We do not regard them as controlling or persuasive, in view of the particular facts disclosed.

We are of the opinion that the notation upon this check did not destroy its negotiability. It was a statement of the transaction which gave rise to the instrument (Rev. Stat. 1909, sec. 9974), in that it had reference to the agreement or understanding between the maker and the payee regarding the renewal of the original note. While it constituted a direction as to the manner in which the proceeds were to be applied, we think that the observance of such directions, which related to an act to

be done *in futuro*, was a matter entrusted wholly to the payee, by plaintiff, and which charged defendant with no duty under the circumstances surrounding its acquisition of the instrument. In this connection see: *Jennings v. Todd*, 118 Mo. 296, 24 S. W. 148; *Stilwell v. Craig*, 58 Mo. 24; *Siegel v. Bank*, 131 Ill. 569; *Duckett et al. v. Bank*, 86 Md. 400, 39 L. R. A. 84.

The check on its face was payable to "Bollman Bros.;" and, with that company's indorsement thereon, it was accepted by defendant in the usual course of its banking business, as a cash deposit. The taking of the check, so indorsed, by the defendant bank for deposit, the payee being given credit for the amount thereof, upon which the payee was entitled to immediately draw, operated to vest the title to the check in defendant and constituted defendant a purchaser for value. [See *Ayres v. Bank*, 79 Mo. 421; *Bank v. Refrigerating Co.*, 236 Mo. 407, 139 S. W. 545; *Kavanaugh v. Bank*, 59 Mo. App. 540.] And, as we view the effect of the notation upon the check, defendant became a bona-fide holder, or a holder in due course, of the instrument. It is argued that defendant paid nothing for the check, but this view is not tenable under the facts shown by the undisputed evidence.

Did the subsequent action of defendant, on June 20, 1913, in charging the account of the Bollman Company with the amount of the two notes which defendant had previously discounted for that company and which had been dishonored, aggregating \$3000, affect defendant's right to retain the proceeds of the check in controversy, or in any way cast liability upon defendant as for having thereby received monies belonging to plaintiff? We think not. We are not here concerned with the rights of the Bollman Company, but we may say that the right, in general, of a bank to apply a deposit, or any part thereof, to a debt due to it from a depositor, is beyond question. [See *Wilson v. Bank*, 176 Mo. App. 73, 162 S. W. 1047; *First Nat'l Bank v. City Nat'l Bank*, 102 Mo. App. 357, 76 S. W. 489.] And we regard it as clear that the charging of these

dishonored notes against the account of the Bollman Company, on July 20th, was a matter between that company and defendant. If defendant, in acquiring this check in the manner shown above, took it unaffected by the agreements or equities between the parties to the instrument, as we hold, it must follow that the balance remaining in the Bollman Company's account four days later merely represented defendant's indebtedness to that company at the time; and that plaintiff had no claim against it or right to complain of the act of defendant in asserting its right to charge back worthless or dishonored paper with which it had previously credited its depositor.

We may add that there is nothing to indicate any *mala fides* on the part of defendant. Its transactions with the Bollman Company in this connection were evidently had in the usual routine of its banking operations. It appears that defendant's cashier did not see the check, which passed through the hands of certain employees in the ordinary course of defendant's business; and the evidence suggests that defendant subsequently acted in ignorance of the fact that the check bore such notation—though of course defendant must be regarded as having had notice thereof.

We are of the opinion that there is no evidence to support a recovery by plaintiff.

Some of the evidence, *supra*, was admitted over appellant's objections, and complaint is made of these rulings; but we perceive no prejudicial error in the admission of the evidence in question.

It follows that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J., and Becker, J., concur.*

WILLIAM DeROUSSE, Respondent, v. THOMAS H. WEST, W. C. NIXON, and W. B. BIDDLE, as Receivers of the ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, a Corporation, Appellant.

St. Louis Court of Appeals. Opinion Filed January 26, 1918.

1. **RAILROADS: Negligence: Crossing Accident: Municipal Corporations: Speed Ordinance.** In an action for personal injuries caused by collision, a city ordinance regulating the speed of freight trains, etc., inside the corporate limits and also requiring a watchman to be stationed on the advancing end of locomotives, etc., *held*, the court properly allowed plaintiff to introduce the ordinance.
2. ———: ———: ———: **Contributory Negligence: Question for Jury.** Evidence *held* to present a question for the jury whether plaintiff driving a wagon should have stopped to listen before attempting to cross the track ahead of a freight train which he could not see, and no warning of its approach having been given.
3. **TRIAL PRACTICE: Instructions: Contributory Negligence: Instructions as a Whole.** In action for personal injuries caused at a railroad crossing where plaintiff relied on general negligence and the humanitarian doctrine and violation of a freight train speed ordinance, and defendant set up contributory negligence, an instruction on the violation of the ordinance, though it omitted reference to the defense of contributory negligence, was not prejudicial, where other instructions fully covered contributory negligence.
4. ———: ———: **Humanitarian Doctrine: Conflicting Theories.** An act of negligence which brings the case within the humanitarian rule can be alleged along with other acts of negligence, provided the acts which bring the case under the humanitarian rule and the other acts of negligence alleged, are not inconsistent and self-contradictory.

Appeal from the Circuit Court of Perry County.—*Hon. Peter H. Huck*, Judge.

AFFIRMED.

W. F. Evans and *W. J. Orr*, for appellants; *T. B. Whittedge* of counsel.

(1) The two sections of the ordinance read in evidence on the part of plaintiff are unreasonable and oppressive and constitute a burden upon interstate commerce, and deprive defendants of the equal protection of the law, and especially the section requiring a watchman to be stationed on the advancing end of a locomotive of all moving trains. 2 Dillon on Municipal Corporations (5 Ed.), sections 589-592, and the many cases cited from this and other States; *St. Louis v. Theatre Company*, 202 Mo. 690, 118 U. S. 356. The court judicially knows that defendants' line from St. Louis to Memphis via St. Marys is an interstate line. *State v. Railroad*, 212 Mo. 658, 111 S. W. 500; *McIntosh v. Railroad*, 168 S. W. 821; 15 Ruling Case Law sec. 48. (2) The error committed in admitting these sections of the ordinance in evidence was emphasized by the court refusing to withdraw them from the consideration of the jury after plaintiff elected to submit the case on the humanitarian doctrine alone. *Haley v. Railroad*, 197 Mo. 25; *Grout v. Railroad*, 125 Mo. App. 552; *Laun v. Railroad*, 216 Mo. 563. (3) The court erred in refusing to direct a verdict for the defendants at the close of all of the evidence on part of plaintiff, and again at the close of all of the evidence, because, it clearly appears as a matter of law that plaintiff's own negligence was the proximate cause of the accident. *Matz v. Railroad*, 217 Mo. 275; *Green v. Railroad*, 192 Mo. 131; *Schmidt v. Railroad*, 191 Mo. 228; *Laun v. Railroad*, 216 Mo. 563; *Holland v. Railroad*, 210 Mo. 338; *Statler v. Railroad*, 204 Mo. 619; *McGhee v. Railroad*, 214 Mo. 530; *Burge v. Railroad*, 244 Mo. 76; *Sanguinette v. Railroad*, 196 Mo. 466; *Huggart v. Railroad*, 134 Mo. 673. (4) Instruction No. 1 given on behalf of plaintiff is clearly erroneous and prejudicial for many reasons, which we will endeavor to point out in our argument. First, it invades the province of the jury; second, it tells the jury defendants were negligent; and, third,

that the evidence shows the accident was so caused. (5) Instruction No. 2 on the part of the plaintiff is erroneous and prejudicial in that it directs a verdict for the plaintiff on the facts hypothecated therein and submits the speed of the train as an element of the humanitarian doctrine. *Laun v. Railroad*, 216 Mo. 563; *Haley v. Railroad*, 197 Mo. 15; *Grout v. Railroad*, 125 Mo. App. 552; *Schmidt v. Railroad*, 191 Mo. 228; *Green v. Railroad*, 192 Mo. 131. (6) The plaintiff having testified as a witness in his own behalf, and failing to testify that he assumed that the train would be operated as required by the ordinance, or that he relied upon its observance, the ordinance should not have been submitted to the jury for any purpose. *Mackowik v. Railroad*, 196 Mo. 570, 94 S. W. 262, and cases cited. (7) Plaintiff admitted that he could not see the train until his mules were on the main line, because of obstructions, and having admitted that he did not stop before going on the track, to enable him to hear, he was guilty of contributory negligence as a matter of law. *Underwood v. Railroad*, 182 Mo. App. 252, 168 S. W. 803; *Mastersson v. Railroad*, 58 Mo. App. 572; *Campbell v. Railroad*, 175 Mo. 161, 75 S. W. 86; *Hook v. Railroad*, 162 Mo. 569, 63 S. W. 360; *Kelly v. Railroad*, 88 Mo. 534; *Dey v. St. Ry. Co.*, 120 S. W. 134. (8) And plaintiff, having elected to submit his case to the jury on the humanitarian doctrine, admits his own contributory negligence. *Matz v. Railroad*, 217 Mo. 275, 117 S. W. 591; *Boyd v. Railroad*, 105 Mo. 371, 16 S. W. 909; *Watson v. St. Ry. Co.*, 133 Mo. 246, 34 S. W. 574; *Weller v. Railroad*, 120 Mo. 653, 23 S. W. 1061; *Nivert v. Railroad*, 222 Mo. 626, 135 S. W. 33; *Krehmeyer v. Railroad*, 220 Mo. 639, 120 S. W. 78; *Keele v. Railroad*, 258 Mo. 62, 167 S. W. 433; *Walker v. Railroad*, 193 Mo. 483, 92 S. W. 83; *Bennett v. Railroad*, 242 Mo. 125, 145 S. W. 433; *Burge v. Railroad*, 244 Mo. 76, 148 S. W. 925. (9) The violation of the speed ordinance is not an element to be submitted under the humanitarian doctrine, and instruction No. 2 given for plaintiff is erroneous and prejudicial. *Haley v. Rail-*

road, 197 Mo. 15, 93 S. W. 1123; Laun v. Railroad, 216 Mo. 563, 116 S. W. 553; Grout v. Railroad, 125 Mo. App. 552, 102 S. W. 1026; Green v. Railroad, 192 Mo. 131, 90 S. W. 805; Schmidt v. Railroad, 191 Mo. 228, 90 S. W. 136.

P. B. Hood for respondent.

(1) Presumptively, the ordinance is valid and reasonable, and such presumption continues until overthrown by the evidence which clearly shows the contrary; and the burden of proof on the party assailing the ordinance. *St. Louis v. Theater Co.*, 202 Mo. 690; *Hisslop v. Joplin*, 250 Mo. 588; *St. Louis v. Liessing*, 190 Mo. 464; 2 *Dillon on Municipal Corporations* (5 Ed.), sec. 649. An ordinance prohibiting trains from running at a greater rate of speed than six miles per hour, in cities of the fourth class, and in busy parts thereof, has been upheld so many times by the court of Missouri, that it is scarcely necessary to cite cases. *Robertson v. Wabash, St. Louis & P. Railroad Co.*, 84 Mo. 119. The ordinance is not invalid as against interstate commerce. *Smith v. Alabama*, 124 U. S. 465, 473; 5 *Opinions of Attorney General*, 554. However, the question of its validity as against interstate commerce, cannot be raised in this case, there being no evidence that it was an interstate train or was carrying interstate matters; and the provision of the ordinance requiring a watchman on the advancing end of the train, was not material in this case (which point will be noticed in the argument) and even if that portion should be void, it does not affect the remainder of the ordinance. (2) If appellant's Point No. 2 stated the correct principle of law, which we do not concede, it would still be inapplicable in this case for the reason that this case was not submitted to the jury on the humanitarian doctrine alone. This will be more fully discussed under Point No. 3 and the argument. (3) Appellant under Point No. 3, cites ten cases to prove respondent was guilty of contributory negligence as a matter of law. There is a great differ-

ence shown by the courts of Missouri, as to what constitutes contributory negligence in the following three cases: (a) In a pedestrian approaching a crossing; (b) a person in a vehicle, with unobstructed view, approaching a crossing; and (c) a person in a vehicle, with obstructed view, approaching a crossing. This case is one under the last class, that is, a vehicle approaching a crossing, with an obstructed view. Not a single case cited by appellant, under his Point No. 3, is that of a vehicle approaching a crossing with an obstructed view. Six out of ten of his cases cited, are pedestrians approaching a crossing, and the other four are vehicles with unobstructed views. The difference in the rules applicable to the three classes of cases is well stated in *Jackson v. Railroad*, 171 Mo. App. 451, 452; *Farris v. Railroad*, 151 S. W. 979, 33 Cyc. 1012. The following cases are all applicable to this case in which a vehicle, with obstructed view, approaching a crossing, as our case. *Weigman v. Railroad Co.*, 223 Mo. 699; *Donahue v. Railroad Co.*, 91 Mo. 357; *Petty v. Railroad Co.*, 88 Mo. 306; *Johnson v. Railroad Co.*, 77 Mo. 546; *Campbell v. Railroad Co.*, 175 Mo. 172, 173; *Underwood v. Railroad Co.*, 190 Mo. App. 407; *Jackson v. Railroad Co.*, 171 Mo. App. 451, 453. (4) This case was not submitted to the jury on the humanitarian doctrine alone. *Taylor v. Metropolitan St. Ry.*, 256 Mo. 210, 211; *Clark v. Railroad*, 242 Mo. 570 and cases cited under No. 3 (see argument). (5) There is no merit to appellant's Point No. 7. Out of the six cases cited by appellant to uphold his Point No. 7, four are not applicable to the case, because they are vehicles with an unobstructed view. And in the two cases of vehicles with obstructed view, to-wit: *Kelly v. Railroad Co.*, the train was making much noise and could have easily been heard by listening. And in *Underwood v. Railroad*, the doctrine laid out in No. 7 is absolutely contradicted and it is there held not to be contributory negligence as a matter of law, but that it was a question for the jury under the circumstances, quoting: "As to whether plaintiff was negligent in

not stopping to look and listen, is a question for the jury." Underwood v. Railroad, 162 Mo. App. 252. Holding to the same doctrine in cases of vehicles with obstructed view, are the following: Weigman v. Railroad Co., 223 Mo. 699 (cases reviewed); Russell v. Railroad Co., 70 Mo. App. 88; Frank v. Transit Co., 99 Mo. App. 324; Weller v. Railroad Co., 120 Mo. 635; Dешner v. Railroad Co., 200 Mo. 327; Johnson v. Railroad Co., 77 Mo. 546; Kennayde v. Railroad Co., 45 Mo. 255. (6) Plaintiff has a right to plead common-law negligence, statutory negligence and negligence under the humanitarian doctrine, all in one count and if the evidence is such that the court is not justified in declaring the plaintiff guilty of contributory negligence as a matter of law, the plaintiff, in appropriate instructions, may submit the humanitarian doctrine in one instruction, and any other theory of the case plead and proved in another instruction, just so these instructions and theories are not inconsistent. Taylor v. Metropolitan St. Ry., 256 Mo. 210, 211; Clark v. Railroad, 242 Mo. 578. The last case above cited criticises Krehmeyer v. Railroad and Nivert v. Railroad (the only two cases cited by appellant that hold to his doctrine that plaintiff cannot submit to the jury the negligence involved in the humanitarian doctrine, and in another instruction, a different theory of the case), declaring that neither of these cases cited are the opinions of the Supreme Court. Clark v. Railroad, 242 Mo. 596. (7) The verdict, regardless of all error, if any, is for the right party and should be upheld. Rev. Statutes of Mo. 1909, sec. 2082; Schnepbach v. Gas Co., 232 Mo. 603; Sherwood v. Railway, 132 Mo. 339. Peterson v. Transit Co., 199 Mo. 331; Cass County v. T. M. Ins. Co., 188 Mo. 1; Hamilton v. Crowe, 175 Mo. 634, 639; State ex rel. v. Stone, 111 Mo. App. 364; Walker v. Wabash R. R. Co., 193 Mo. 453.

BECKER, J.—In this case the respondent, plaintiff below, recovered a judgment for \$5000 for personal

injuries received by him in a collision between one of appellants' locomotives and a wagon in which plaintiff was riding. The defendants in due course bring this appeal.

Plaintiff's petition seeks to recover on the following grounds:

First: The violation of an ordinance of the city of St. Marys, Missouri, limiting the speed of freight trains to six miles per hour.

Second: The violation of an ordinance of the city of St. Marys, requiring a watchman to be stationed on the advancing end of all locomotives, cars and trains, while being operated or run within the corporate limits of said city.

Third: The failure to give the statutory cross-road signals.

Fourth: In addition it is alleged that the plaintiff was in a place of peril and that the employees of defendant saw, or by the exercise of proper care could have seen plaintiff's peril in time to have stopped the train or to have slackened its speed so as to have avoided the collision.

The answer was a general denial and a plea of contributory negligence.

The collision occurred within the corporate limits of the city of St. Marys, Missouri, at the intersection of the main tracks of the defendants' railroad company and Pine Street. The railroad tracks in question ran through St. Marys on the banks of the Mississippi River and at the point in question the tracks consisted of a main line and a side track or switch. These tracks ran parallel with each other and as close together as the safe operation of cars over each track would permit. The tracks run almost east and west, the main track being the nearer of the two to the river. Pine Street, where it intersects the said tracks, runs almost north and south.

Plaintiff was driving a wagon, drawn by a team of gentle mules, north along Pine Street toward the river. The view from Pine Street to the north is obstructed

by buildings along the side of defendants' tracks and on the day in question the plaintiff's view was further obstructed by a box car which was standing on the side track either immediately next to or very near the point where Pine Street crosses the said railroad tracks, so that plaintiff could not see down the main line until he passed the box car which was standing on said side track. Plaintiff testified that as he drove down Pine Street and passed the box car on the side track, he glanced down the track and saw no train and did not hear any, and, "I glanced up and I never seen or heard none. After I got just about on the main track I glanced down again and seen it. I suppose it was between thirty and forty feet from me. Of course, I may have been a little excited, and I started to whip my team, and I believe if I had had a young team I would have made it alright, and the train hit the wagon and I started to jump but whether the wagon hit me or the train hit me I could not say. . . . Q. Was the train, at the time you discovered it, making any noise? A. No, sir."

On cross-examination plaintiff testified that he did not stop his team before he started across the tracks; that he looked twice, the first time he looked was just as soon as he got past the box car, and the second time was when the mules were on the main track, but whether the mules, at the moment he saw the engine, had their forefeet on the track or their entire bodies, he was unable to say. The mules were walking at the time at the rate of three miles per hour.

The plat introduced in evidence below shows that the west rail of the side track is 6.75 feet from the corner of the building which stands at the intersection of Pine Street and said tracks. The said side track has a width of 4.95 feet and there was a distance between the side track and the main line of 9.45 feet, the main line in turn was 4.95 feet in width.

Willis Morrison, a witness for plaintiff, testified that he was driving a wagon immediately behind the plaintiff; that the train, which consisted of an engine and some eight or ten freight cars, came along with the

steam shut off and was not making any noise but was coasting; that he did not hear any bell ringing nor did he hear any whistle; that he saw plaintiff's mules were just on the main track and the train some twenty to thirty feet away when the plaintiff raised up and began to whip the mules in his endeavor to get across the tracks; that, "the train was running along tolerable pert," probably ten miles an hour; he saw the box car on the side track and the end of it was extending half way across the sidewalk of Pine Street. He further stated that the train ran two rails in length after colliding with plaintiff's wagon, which it struck between the front and rear wheels.

Another witness, E. R. Shoults, testified he saw the train going by his home; that his attention was drawn to it by the fact that it did not whistle or ring a bell; that it went by at a speed of about ten to fifteen miles per hour. His home was within three hundred steps of the Pine Street crossing.

Charles Nelson testified that he saw plaintiff just before he got to the switch or side track; that he saw him drive on and that when plaintiff got on the main line he looked down the track; that it was impossible for plaintiff to have seen the engine before that time; that plaintiff then raised up and began whipping his team. Plaintiff jumped when the team was on the main line. The train hit the wagon and ran over plaintiff. Witness did not hear any whistle blown nor did he hear any ringing of the bell. When the collision occurred the witness was sitting down eating his lunch and was within one hundred and fifty feet of the place of the accident. When plaintiff's mules were on the main line the train was about seventy-five to eighty feet away from him and the front wheels of plaintiff's wagon were on the west rail of the main track when plaintiff saw the engine; that the train was coming along at a rapid speed up to within seventy-five to eighty feet of the crossing, and was making some noise up to that point but from there on it was not making any noise and was coasting along; that the speed of the train did not

slacken until it got within three or four feet of plaintiff's wagon; that the train ran about a rail and a half to two rails in length after it struck plaintiff's wagon. He further testified that there was a box car on the side track which was standing four feet from the offset of the building next to the intersection of Pine Street and the railroad crossing; that plaintiff's team was moving between three and four miles an hour. At one time he stated that the train was going three or four times as fast as the wagon, and at another time that the speed of the train was between six and nine miles an hour.

H. H. Sheer testified that the box car was about one foot north of the side walk.

Benj. Lukefhar testified that the end of the box car was near the end of the sidewalk on the side of Pine Street just a little north of the corner; that quite a few townspeople looked at the box car immediately after the accident and he remembered that it was close to the street.

One William P. Smith testified that he had been a locomotive engineer for over twenty years; that a locomotive of the type in question pulling ten freight cars, if they were loaded, and running at a speed of six miles per hour on a dry track could be stopped in about fifteen feet and if the speed was eight miles per hour at twenty-five feet, and if eight to nine miles per hour within thirty feet.

One Robert McAtee testified that he had been a locomotive engineer for over twelve years; that he knew the particular crossing at which plaintiff was injured, having passed over it in an engine approximately 2500 to 3000 times and that he was familiar with the type of engine that collided with plaintiff's wagon; that an engine of that type, in hauling ten loaded cars over this crossing on a dry track, when running at the rate of six miles per hour, could be stopped within fourteen to fifteen feet; running eight miles within seventeen feet; ten miles within twenty-two feet.

L. R. Tucker testified that he saw the train and in his opinion it was running between eight and ten miles and hour; that he did not hear either the bell ringing or any whistle sounded; that he did hear the report of the exhaust of the engine just about the time it started up, which was some 1500 feet or more from the scene of the collision.

James McClain, one of the witnesses for the defendant, testified that he was up at the depot, 1500 feet from the place where the collision occurred, and saw the train start away from the water tank; that he heard the engineer blow the whistle as it left the water tank but that he did not hear them blow the whistle or ring the bell after they had gone from there up to the time they had struck plaintiff's wagon; that the train pulled out pretty fast, "they were headed at a pretty good lick, I heard them say that they had lost an hour's time waiting and they had to get out of there." In answer to the question as to whether the train was puffing or going along without puffing, answered: "They were gliding along pretty smooth." In his opinion the train was going ten to twelve miles an hour.

The engineer in charge of the engine testified that he did not see the plaintiff until he was directed by the fireman to stop; that at the time the fireman called to him the train was moving about six miles an hour; that he immediately made an emergency stop; that the front of the locomotive was perhaps five feet from the wagon when he started to stop; that the coupling between the engine and the tank was standing on the crossing about thirty-five feet after he did stop the train. He was sure that the bell was not ringing as they approached the crossing but that they had blown two short blasts of the whistle at the time they started up from the water tank. As the fireman called to him, and, "when I looked up, the team were on the right hand side with the front wheels and bed of the wagon coming off on the right hand side."

The fireman on the engine testified that as they approached the crossing at Pine Street he had just finished

putting coal into the fire-box and had gotten up into his seat to look out ahead when he saw plaintiff and a team of mules about twenty feet ahead of the engine. Plaintiff was whipping his mules with the ends of his lines, trying to get across and avoid a collision; that he called to the engineer to stop, which the engineer did, making an emergency stop; that when the engine was brought to a stop it was about sixteen feet beyond the crossing; that the engine was moving at about six miles per hour when the witness first saw the plaintiff; that the engine had been brought to a stop after the engineer, "started to stop, in about twenty feet."

In addition to the testimony set out above the record contains two sections of an ordinance of the city of St. Marys introduced by the plaintiff. One of the sections of the ordinance limits the speed of other than passenger trains, cars, engines or locomotives, within the corporate limits of the city of St. Marys, to not exceed six miles per hour. The other section of the ordinance requires any locomotive, engine, car or train being run through the corporate limits of the city in the daytime, to have a watchman on the advancing end of such locomotive, car or train.

The plaintiff's case was submitted to the jury on the humanitarian doctrine as well as upon the question of the negligence of defendants in the alleged violation of the ordinance limiting the speed of freight trains to not exceed six miles per hour.

The first assignment of error is that the plaintiff was permitted to introduce in evidence the two sections of the ordinance. We have examined the record carefully, as well as the objections made below by the defendants' learned counsel at the time the ordinance was offered in evidence, and we hold the court properly allowed the plaintiff to introduce it.

The next error assigned is that the court erred in refusing to direct a verdict for the defendants at the close of all the evidence on the part of the plaintiff and again at the close of all the evidence in the case,

because the plaintiff, as a matter of law, was guilty of contributory negligence which was the proximate cause of the accident.

In view of the testimony in the case can we hold that plaintiff was guilty of contributory negligence as a matter of law for failing to stop and listen before he started to drive his team across the defendants' tracks? It must be remembered that nearly all the testimony on this point was to the effect that the engine and cars were approaching the crossing making very little noise. As most of the witnesses put it, the engine had the steam shut off and the train was "coasting." In addition it is admitted that the bell was not ringing. With this state of facts before us, can we say as a matter of law that if plaintiff had in point of fact stopped his wagon and listened, he could have heard the approaching train? The facts in this record fall clearly within the rule of law as laid down in the case of *Donohue v. Railroad*, 91 Mo. 357, where the court held that one attempting to cross railroad tracks at street crossings where the view of the tracks is obstructed, cannot be held guilty of contributory negligence in failing to stop and listen for the train, when it does not appear from the evidence that he could have heard the train had he stopped and listened.

As was said in *Kennayde v. Railroad*, 45 Mo. 255, l. c. 261: "The citizen who, on a public highway, approaches a railway track, and can neither see nor hear any indications of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous."

In the instant case we hold that whether the plaintiff should have stopped to listen before attempting to cross the tracks, was a question for the jury, and an examination of the instruction given by the court for the defendants shows that this question was properly submitted to the jury. [See *Jackson v. Railroad*, 189 S. W. (Mo.) 381.]

The assignment of error that appellants lay most stress upon is the giving of instruction No. 2 for the plaintiff. This instruction, it is contended by appellants, submitted the case to the jury upon the humanitarian doctrine, and that in said instruction the speed of the train is submitted as an element therein. Learned counsel for appellants is in error. A careful reading of the record convinces us that there was ample testimony offered tending to prove not only the allegations in the petition sufficient to submit to the jury the question of whether the plaintiff was entitled to recover under the humanitarian doctrine, but also to submit the question of the negligence of the defendants as to the alleged violation of the speed ordinance which limited freight trains to six miles per hour. Instruction No. 1, for plaintiff, correctly and fully submitted the question on the humanitarian doctrine. Instruction No. 2 we hold was intended to and did submit to the jury the allegation of the negligence of defendants based upon a violation of the speed ordinance. The said instruction does, however, omit any reference to the defendant's defense that the plaintiff was guilty of contributory negligence, but an instruction given for the defendants specifically and fully sets this out. The instruction at first blush might, if standing alone and read apart from the case by reason of its wording, lead one to believe that it was intended to cover the humanitarian doctrine, but, when read as part of the case and in connection with the other instructions given, it is not open to such construction. As to the omission of any reference therein to the defendants' defense of plaintiff's contributory negligence, we must hold that inasmuch as it was fully covered by defendants' instruction, this omission under the facts in the instant case, was not prejudicial error. As was said in the case of *Bettoki v. Northwest Coal & Mining Co.*, 180 S. W. (Mo. App.) 1021, l. c. 1023: "A further objection to plaintiff's instructions is that they purport to cover the whole case and direct a verdict, but omit defendant's defense

of contributory negligence. The instructions, standing alone, are subject to this criticism. But they are cured by those given for defendant, which clearly make known to the jury that no verdict should be rendered for plaintiff if he was guilty of negligence. The rule in this State is that if, in the submission of a case by an instruction for plaintiff purporting to cover the whole case and directing a verdict, the defendant's defense of contributory negligence is omitted, it is reversible error, unless defendant covers the omission by instruction of his own, thus presenting a set of instructions, taken as a whole, that clearly submit the whole case. [Owen v. Railroad, 95 Mo. 170, 181, 8 S. W. 350, 6 Am. St. Rep. 39; Lange v. Railroad, 208 Mo. 458, 477, 478, 106 S. W. 660; Anderson v. Railroad, 161 Mo. 411, 427, 428, 61 S. W. 874; Fugler v. Bothe, 117 Mo. 475, 491, 22 S. W. 1113; Meadows v. Life Ins. Co., 129 Mo. 76, 97, 31 S. W. 578, 50 Am. St. Rep. 427; State ex rel. v. Hope, 102 Mo. 410, 426, 14 S. W. 985; Patterson v. Evans, 254 Mo. 293, 304-308, 162 S. W. 179; Ellis v. Railroad Co., 234 Mo. 657, 679, 138 S. W. 23; Hughes v. Railroad, 125 Mo. 447, 452, 30 S. W. 127; State v. Tatum, 274 Mo. 357, 373, 175 S. W. 69.] As stated by us in Holman v. City of Macon, 177 S. W. 1078, these authorities have been followed in a great number of decisions by the Courts of Appeals."

The next point raised by defendants is that in submitting his case to the jury upon the humanitarian doctrine plaintiff thereby admits his own contributory negligence and is therefore barred from submitting any other theory, for his recovery, to the jury, even though such other act of negligence be pleaded in plaintiff's petition, and that on the ground that such other alleged acts of negligence are inconsistent with such humanitarian doctrine.

It is no longer open to argument but that the plaintiff has a right to plead all negligent acts whether common law or statutory all in one count, and that an act of negligence which brings the case within the humanitarian rule can be alleged along with other acts of negli-

gence, provided the acts which bring the case under the humanitarian rule and the other acts of negligence alleged are not inconsistent and self-contradictory. In the case before us the acts alleged as bringing the case under the humanitarian rule and the other act of negligence which is the alleged violation of the speed ordinance, are not inconsistent and the plaintiff having adduced proof sufficient to take either assignment to the jury, was properly permitted to have both submitted to the jury, under proper instructions.

We have examined the several assignments of error made by appellants and find no prejudicial error, and the judgment, being for the right party, is accordingly affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

PETER HELLMAN, Respondent, v. NATIONAL
COUNCIL OF THE KNIGHTS AND LADIES OF
SECURITY, Appellant.

St. Louis Court of Appeals. Opinion Filed February 5, 1918.

1. **INSURANCE: Fraternal Insurance: Recovery of Dues Paid.** Where a benefit certificate was secured by a fraudulent misrepresentation on the part of the insured as to his occupation, he cannot, after the fraud has been discovered, and the policy avoided, maintain an action for return of the premiums paid by him.
2. ———: ———: **Fraud: Misrepresentation of Occupation.** Stipulations and evidence, in an action to recover premiums paid on a mutual benefit insurance certificate, examined and *held* that insured fraudulently made a false statement as to his occupation, with full knowledge of the occupations prohibited by the order, and that he knew of his ineligibility to membership.
3. **EQUITY: Clean Hands: Benefit Certificate Fraudulently Procured: Recovery of Dues Paid.** In an action as for money had and received to recover premiums paid for mutual benefit insurance, *held* that plaintiff, because of his false and fraudulent statement in procuring the issuance of the certificate, had no standing in court; the action being of an equitable nature.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. Karl Kimmel*, Judge.

REVERSED.

W. Paul Mobley for appellant.

(1) Representations made by an applicant for membership in a Fraternal Beneficiary Association are warranties and when false avoid the policy and work a forfeiture of all rights of the applicant and the beneficiary. *McDermott v. Modern Woodmen of America*, 97 Mo. App. 636; *Valleroy v. Knights of Columbus*, 135 Mo. App. 574; *Hoagland v. Modern Woodmen of America*, 157 Mo. App. 15; *Aloe v. Mutual Reserve Life Association*, 147 Mo. 561; *Sovereign Camp Woodmen of World v. Hall*, 104 Ark. 538; *Dinan v. Supreme Council of the Catholic Mutual Benefit Association*, 201 Pa. St. 363; *Holland v. Chosen Friends*, 54 N. J. Law. 490; *Supreme Council of American Legion of Honor v. Green*, 71 Md. 263. (2) The application, Constitution and Laws of a Fraternal Beneficiary Association form a part of the contract and the members are bound by their provisions. *Claudy v. Royal League*, 259 Mo. 92; *Gallop v. Royal Neighbors of America*, 167 Mo. App. 85; *Grand Lodge v. McFadden*, 213 Mo. 269-284; *Westerman v. Supreme Lodge* 196 Mo. 738; *Easter v. Yeoman*, 172 Mo. App. 292. (3) Neither the insured nor the beneficiary has a vested interest in the Beneficiary Certificate. The cancellation of the certificate, or the refusal of the defendant to accept further assessment when it learned that Hellman was engaged in a prohibited occupation, did not interfere with any vested rights either of Hellman or his beneficiary. *Claudy v. Royal League*, 259 Mo. 92; *Callies v. Modern Woodmen of America*, 98 Mo. App. 521, l. c. 526. (4) The Beneficiary Certificate having been obtained by actual fraud, the Society was under no legal obligation to return what had been paid as assessments before it could claim that the contract was not in force. *Taylor*

v. Grand Lodge, A. O. U. W. of Minnesota, 96 Minn. 441; Wheeler v. Mutual Assn., 102 Ill. App. 48; Touro v. Cassin, 9 Am. Dec. 680; Swartz v. U. S. Insurance Co., 21 Fed. Cases, 770; Hoyt v. Gilman, 8 Mass. 336. (5) Fraternal beneficiary associations are essentially benevolent, the insurance feature being merely an incident, and it cannot be said that there was failure of consideration for the payments which the plaintiff seeks to recover. Umberger v. Modern Brotherhood of America, 162 Mo. App. 141; State ex rel. v. Vandiver, 213 Mo. 187; Currier v. Catholic Order of Foresters, 88 Atl. Rep. (Vt.) 525. (6) The peremptory instruction to find for defendant offered at the close of plaintiff's case should have been given. (7) The judgment is so grossly and overwhelmingly against the evidence and the law as to call for a reversal.

George D. Little for respondent.

ALLEN, J.—Defendant is a fraternal beneficiary society, and on or about June 3, 1907, plaintiff became a member of such society and defendant issued to him a benefit certificate in consideration of certain monthly premiums to be paid thereon. On or about March, 1913, defendant refused to receive further payments on the certificate, declaring it null and void, upon the ground that plaintiff had obtained the issuance thereof by fraud. Plaintiff thereupon instituted this action, before a justice of the peace, for a recovery of the premiums paid, as for money had and received. The cause reached the circuit court on appeal where a trial before the court, a jury having been waived, resulted in a judgment for plaintiff in the sum of \$230.10, being the total amount of premiums paid by plaintiff on the certificate, to-wit, \$212.52, with interest thereon. From this judgment defendant prosecutes the appeal before us.

To sustain the issues on his part plaintiff introduced in evidence the benefit certificate. Among other things it provided that if the member holding the

certificate should be or become engaged in any of the prohibited occupations, "as provided in the Laws of the Order," then the certificate should be null and void, and that all money which had been "paid into reserve fund, beneficiary fund or National Council general fund" should be forfeited.

Thereupon plaintiff's counsel made the following statement, viz:

"It is stipulated by and between the attorneys for the plaintiff and the defendant that the insurance policy, or fraternal benefit certificate, . . . was duly issued by the defendant to plaintiff, Peter Hellman; that the plaintiff paid the premiums on said policy up to the premium for March, 1913; that the plaintiff, in March, 1913, tendered the premium due to defendant, and that the premium due in that month was refused by defendant on the ground that the policy had been secured by the plaintiff by fraud, said fraud consisting of a misrepresentation as to his occupation at the time of the issuance of said policy, and that from the date of the certificate up to the time of the refusal to accept the premium the plaintiff was engaged in the occupation of a saloonkeeper and bartender, which is one of the prohibited occupations of the society, prohibited by the terms of the policy, and also by the constitution and by-laws of the defendant society.

"It is further stipulated and agreed that the plaintiff, from the time of the issuance of said policy up to the time of the refusal of defendant to accept premiums on said policy, had paid to defendant company the premium called for by said policy, namely \$2.65 per month, the said payments having been made from the month of June, 1907, until the month of March, 1913.

"It is further stipulated and agreed that the plaintiff at the time of the application and issuance of the policy, introduced in evidence, was engaged in the business of saloonkeeper and bartender, and continued in that occupation up to the time of the refusal of defendant to accept further premiums on said policy."

Thereupon defendant's counsel made the following statement, viz:

"It is further agreed and stipulated between the parties hereto that the defendant society is now, and was at all times mentioned in the plaintiff's petition, a fraternal beneficiary society organized and incorporated under the laws of the State of Kansas, and authorized and licensed to do business as such fraternal beneficiary society in the State of Missouri under and by virtue of the laws of the State of Missouri in such cases made and provided.

"It is further stipulated and agreed that the plaintiff stated and warranted in his written application for membership in the defendant society that at said time he was engaged in the occupation of grocery clerk; that in said written application plaintiff agreed and warranted that all of the answers made by him in said application were fair and true and constituted a strict warranty; that in said written application plaintiff agreed to be governed by the constitution and by-laws of defendant society then in force, and thereafter enacted."

Plaintiff's counsel thereupon announced that he would rest upon the stipulation.

Thereupon defendant requested the court to declare as a matter of law that plaintiff was not entitled to recover, which declaration the court refused to give.

Defendant then introduced in evidence the "constitution and laws" of defendant society in force at the date of the application of plaintiff for membership in the society, and likewise introduced defendant's constitution and laws in force in March, 1913. The constitution and laws in force at the time of plaintiff's application for membership, in making provision regarding "prohibited occupations," provided, among other things, that persons should not be received or retained in the beneficiary or social membership of any subordinate council who were engaged in certain occupations, among these being "persons engaged . . . as saloon owner, saloonkeeper or bartender engaged in the

sale of spiritous, malt, or vinous liquors as a beverage;" and severe penalties were imposed upon the "financier" of any council who should receive assessments from any member whose certificate had been cancelled on such ground, or who should reinstate such member. Such, in substance, were likewise the provisions of defendant's constitution and laws in force in March, 1913.

It is argued for defendant, appellant here, that under the evidence and the stipulation submitted to the trial court plaintiff was not entitled in law to the return of the premiums paid by him, and that the court erred in refusing to so declare and in entering judgment for plaintiff. This is the only question before us.

The rule of law pertinent to the situation in hand appears to be well stated in 14 Ruling Case Law, p. 959, sec. 132, as follows: "The authorities are unanimous in declaring that where a policy was secured by a fraudulent misrepresentation on the part of the insured, he cannot, after the fraud has been discovered and the policy avoided, maintain an action for the return of the premiums paid by him. But where the misstatements made by the insured were not wilfully false, so that there was no fraud on his part, and the policy by its terms was void *ab initio*, so that the risk never attached, the insured is entitled to a return of the premiums."

This doctrine is well supported by the authorities. [See *Vining v. Franklin Fire Ins. Co.*, 89 Mo. App. 311; *Elliott v. Knights of Modern Maccabees*, 46 Wash. 320, 13 L. R. A. (N. S.) 856; *Insurance Co. v. Pyle*, 44 Ohio St. 19; *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 206; *Himely v. South Carolina Ins. Co.*, 1 Mill. Const. (S. C.) 154, 12 Am. Dec. 623; *Feise v. Parkinson*, 4 Taunt. 640, 14 Eng. Rul. Cas. 530 and notes; *Metropolitan Life Ins. Co. v. Freedman*, 159 Mich. 114, 32 L. R. A. (N. S.) 298; 2 May on Insurance (4 Ed.), p. 1339, sec. 567; *Swartz v. U. S. Ins. Co.*, 21 Fed. Cas. 770; *Hoyt v. Gilliman*, 8 Mass. 336; *Taylor v. Grand Lodge A. O. U. W.*, 96 Minn. 441.

In *Vining v. Franklin Fire Ins. Co.*, supra, 89 Mo. App. 311, l. c. 323, this court, in an opinion by GOODE, J., said: "While the assured cannot recover unearned premiums on account of a void policy, if there has been fraud practiced in its procurement, the rule is otherwise where the holder is innocent. If the risk never be attached by reason of a mistake, free from any evil practices, the insured is entitled to the return of the whole premium, for none of it was earned."

It follows that plaintiff is not entitled to recover if the false statement as to his occupation, made in procuring the certificate, and warranted to be true, was wilfully or intentionally made; and such, we think, is the tenor and purport of the stipulation. That the statement was false stands conceded; and that it was not innocently or inadvertently made, but intentionally and fraudulently, appears to be the only conclusion which may properly be drawn from the facts of this record. It is stipulated that in his written application plaintiff agreed to be governed by the constitution and laws of the society then in force or thereafter enacted. The laws of the order then in force were therefore called into and became a part of the contract, and plaintiff must be regarded as having made this false statement with full knowledge of the prohibited occupations; and he retained the certificate and continued as an ostensible member of the society for nearly six years, during all of which time he was charged with knowledge of his ineligibility to membership. All of the facts disclosed indicate a wilfull misstatement by plaintiff as to his occupation, evidencing an actual intent to defraud; indeed there is no suggestion of an unintentional misstatement, as through mistake or inadvertence. And we conclude that the judgment in plaintiff's favor cannot be upheld.

Respondent has not favored us with a brief, but has filed, by leave, a memorandum citing the decision of this court in *Modern Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 291, which was a suit in equity by a fraternal order seeking the cancellation of a benefit

certificate on the ground of fraud in its procurement. In that case the plaintiff society had tendered and paid into court the premiums paid by the defendant, but had not offered to pay interest thereon. It was held that plaintiff would be granted the relief prayed upon depositing in court the amount of the premiums with interest; and the court, through NORTON, J., said: "It is certain that a court of equity will not cancel or divest property rights without requiring the adverse party to place the one whose right is cancelled or divested in *statu quo*." This was merely an application of the rule that one who comes into a court of equity seeking to cancel a contract for fraud in its procurement must return the benefits received thereunder, or put the other party in *statu quo*, where this may be done, in keeping with the maxim that he who seeks equity must do equity. It is argued for respondent that appellant is here under the same obligation to return these premiums as it would have been had it brought an action in equity to cancel the certificate. In this, we think, the respondent is in error. Granting that had appellant come into a court of equity seeking affirmative equitable relief, in order to foreclose the question of liability on the certificate, it would have been compelled to return the premiums, it does not follow, we think, that this plaintiff has any standing in court to recover the same in this action. This distinction is recognized in *Metropolitan Life Ins. Co. v. Freedman*, 159 Mich. 114, 13 L. R. A. (N. S.) 298.

Where one submits to the cancellation of such a certificate, on the ground of fraud alleged to have been perpetrated by him in its procurement, and brings his suit to recover the premiums as for money had and received; the courts may properly deny him a recovery upon the ground that he will not be permitted to take advantage of his own fraud, if actual fraud appears. It is a trite doctrine that the action for money had and received is of equitable origin and character, and lies only where the defendant has received money belonging to the plaintiff which in equity and good

conscience ought to be restored to him. In a case of this character, where fraudulent practices appear on the part of the plaintiff in the procurement of his certificate—where he voluntarily parted with his money in an effort to defraud—it cannot be said that he is entitled, in equity and good conscience to the return thereof.

Plaintiff is not denied a recovery of the premiums for the reason that the certificate attempts to forfeit them (See *Metropolitan Life Ins. Co. v. Freedman*, supra), but on the ground that because of the false and fraudulent statement made in procuring the issuance of the certificate he will be held to have no standing in court to prosecute an action of this character.

The judgment will accordingly be reversed without remanding the cause. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

N. A. AUBUCHON, et al., Appellants, v. AUGUST AUBUCHON, et al., Respondents.

St. Louis Court of Appeals. Opinion Filed February 5, 1918.

1. **VOLUNTARY ASSOCIATIONS: Stock: Restrictions on Sale: Validity.** Provisions in the constitution of a voluntary association, organized to erect and maintain a telephone system, requiring members to offer stock for sale, first to the association, was a mere condition precedent, attached to the right to sell the stock, and not an unreasonable restraint upon the alienation of the stock, and was therefore valid.
2. ———: **Sales of Stock: Validity.** Members of a voluntary association, organized to erect and maintain a telephone system, having agreed to be bound by the constitution, which required members to offer stock for sale, first to the association, could not complain that the association was not empowered to take title to the stock, in the absence of an offer of sale of the stock to the association.
3. ———: ———: **Partition of Personal Property: Rights of Members.** Provisions in the constitution of a voluntary association, organized to erect and maintain a telephone system, requiring mem-

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bers to offer stock for sale, first to the association, was a condition precedent attached to the right to partition personalty, and such provision was valid, so that members of the association were not entitled to partition until after they had offered their stock for sale to the association.

Appeal from the Circuit Court of Cape Girardeau County.—*Hon. Frank Kelly*, Judge.

AFFIRMED.

Robert A. Swink and *Robert W. Hall* for appellants.

Section 2619, Revised Statutes of Missouri, 1909, provides as follows: "Partition of personal property—proceedings in. Any one or more of two or more joint owners of personal property, other than boats and vessels, may file a petition in the circuit court for a partition or a sale and partition of the proceeds thereof, in the same manner as suits may be instituted for the partition and sale of real estate, and like proceedings had thereunder, as near as may be, as provided in cases for the partition of real estate." "Partition of personal property—joint owners—sale. Under section 4432, Revised Statutes, 1899, one or more of the joint owners of personal property, other than boats, etc., may bring an action to have such personal property partitioned among the owners, and, if it cannot be divided in kind, to have it sold and the proceeds divided. This applies to a telephone line owned by a number of farmers constructed and maintained for their own convenience." *Meinhart v. Draper et al.*, 133 Mo. App. 50. An agreement between co-tenants of land that neither they nor their heirs or assigns shall ever institute suit for partition of the property is void, as being an unreasonable restraint on its enjoyment and use. *Haeussler v. Mo. Iron Co. et al.*, 110 Mo. 183, 194. An unincorporated association is incapable of taking title to real or personal property. *Douthitt v. Stinson*, 73 Mo. 200; *T. A. Miller Lbr. Co. v. Oliver et al.*, 65 Mo. App. 435, 439. In 25 Am. & Eng. Ency. of Law (2 Ed.), sec. 5, page

1132, it is said: "An unincorporated association having no legal existence independently of the members who compose it, is incapable as an organization of the ownership of either real or personal property, and the title, legal or equitable, to any property acquired for the use of such association vests not in the association as such, but in the members thereof in their joint associated capacity." "The right of partition is an absolute right which yields to no consideration of hardship or inconvenience (Freeman on Cotenancy and Partition, p. 433). Anything that militates against this right is repugnant to the essential characteristics of cotenancy (Mitchell v. Starbuck, 10 Mass. 11). And the tendency of our times is to greater freedom of sale and transfer of property unfettered by conditions or limitations of the right of alienation." In order to constitute waiver, the agreement between the parties not to partition must be plain and unequivocal, and the minds of the parties must come together on this one point. *Haeussler v. Mo. Iron Co.*, supra; *Yglesias v. Dewey*, 60 N. J., Eq. 62; *Brown v. Coddington*, 72 Hun. (N. Y.) 147; *Colman v. Colman*, 19 Pa. (7 Harris) 100; *Roberts v. Wallace*, 100 Minn. 359.

C. J. Stanton, Wm. C. Boverie and A. M. Spradling for respondents.

(1) The judgment of the lower court should be affirmed because appellants have not complied with rule 18 of this court in the assignment of errors. *Matthews v. Insurance Company*, 153 Mo. App. 386; *State v. Tope*, 19 Mo. App. 273; *Foster v. Trimble*, 18 Mo. App. 394; *Miller v. Folmsbee*, 59 Mo. 143; *James v. Bishop*, 58 Mo. 555. (2) (a) A voluntary association may agree to be governed by such rules as they may adopt, and when they are not immoral, contrary to public policy, or in contravention of the law of the State, they are binding on the members, and they measure his duties, rights and liabilities. *Missouri Bottlers' Association v. Fennesty*, 81 Mo. App. 525, 533; *State v. St. Louis Med-*

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ical Society, 91 Mo. App. 78, 82. (b) The rights of an unincorporated voluntary association are fixed by the constitution and by-laws and rest in contract and a majority of its members cannot break the contract any more than a minority could do it. Kuhl v. Myer, 42 Mo. App. 474, 479; Hammerstine v. Parsons, 38 Mo. App. 332, 336; Colman v. Knights of Honor, 18 Mo. App. 189, 194. (c) The court will not undertake to regulate the internal affairs of a voluntary association. It is only when property rights are involved that the court takes jurisdiction at all, and then only when the party has exhausted his remedy within the association. Crutcher v. Order of Railway Conductors, 154 Mo. App. 622, 630; Mutray v. Knights of Honor, 28 Mo. App. 463; Meade v. Sterling, 23 L. R. A. 227. (3) When appellants signed the constitution and by-laws, they waived any right they had to contest the provisions thereof, and agreed that before they offered their stock for sale, they would first offer it for sale to the company at a price not to exceed the original cost of each share. This property cannot be divided in kind, and partition thereof means a sale, and since they have not complied with the constitution and by-laws, they are estopped from maintaining this suit. Hill v. Reno, 111 Ill. 154; Martin v. Martin, 170 Ill. 639, 48 N. E. 924; Springer v. Bradley, 188 S. W. 175, 178. (4) While an unincorporated association is incapable of taking and holding title to real estate, a conveyance to an unincorporated association, the members of which can be ascertained, vests title in the members thereof and they hold the title as tenants in common. Byam v. Bickford, 140 Mass. 31, 2 N. E. 687; Guild v. Allen, 28 R. I. 430, 67 Atl. 855; 25 American and English Encyclopedia (2 Ed.), 1132; 5 C. J. 1343; 4 Cyc. 307. (5) The appellants violated the provisions of the constitution and by-laws of this Telephone Company by the institution of this suit and their failure to offer for sale their stock to the Company prior to the institution of the suit and have not come into court with clean hands. Primm v. White, 162 Mo. App. 594; Little v. Cunningham, 116 Mo. App. 545.

ALLEN, J.—This is a suit to partition personal property. Plaintiffs, four in number, are members of a voluntary association, consisting, it is said, of one hundred twenty-seven members in all, organized for maintaining and operating a local telephone line in the counties of Ste. Genevieve, Jefferson and St. Francois in this State. The petition sets up that plaintiffs and defendants are the joint owners of the property used for conducting the telephone line or system, together with certain franchises, books and records, etc; that the share of the personal property to which each plaintiff and each defendant is entitled is a one one hundred and twenty-seventh interest therein; and that there are no liens upon the property. Partition is prayed in the usual form.

The answer contains first a general denial, and then sets up the constitution and by-laws of the association, averring the due adoption thereof and that plaintiffs signed the same, assented thereto and agreed to be bound thereby, as evidenced by the following provision appearing above their signatures, viz: "We, the undersigned, hereby accept the above constitution and by-laws and agree jointly and severally to be governed by the same."

Section nine of the constitution, as contained in the answer, is as follows: "The capital stock of this company shall not be increased in excess of \$20 without a majority vote of members present at any regular meeting. No member shall be allowed to own more than one share of stock, nor shall he be allowed to sell his share of stock until after he has offered it for sale to the company at a price not to exceed the original cost of the share. Any share of stock so purchased by the company shall be held as common stock of the company, but can be sold by the company to any person who is not a stockholder at the time of purchase."

By their reply plaintiffs aver that section nine of the constitution, *supra*, "is ambiguous; is an unreasonable restraint upon the alienation of the property of the members of this association and is contrary to public policy."

The cause was submitted to the court upon the pleadings and a stipulation of counsel wherein it was admitted that the facts set out in the petition are true; that the constitution and by-laws are correctly set forth in the answer; that plaintiffs, prior to the institution of the suit, made no offer to sell their shares to the association; and that the property cannot be divided in kind.

The trial court, after having refused certain declarations of law requested by plaintiff which need not be here set out, found the issues for defendants and entered judgment accordingly. From this judgment plaintiffs prosecute the appeal before us.

It is argued that upon the pleadings and the stipulation plaintiffs were entitled to a judgment in partition. The proceeding is brought under section 2619, Revised Statutes, 1909, providing for the partition of personal property, other than boats and vessels. That a member or members of a voluntary association of this character, namely, one organized for the operation of a local telephone system for the convenience of its members, may maintain a suit to partition the property utilized for the purposes mentioned, was held by this court in *Meinhart v. Draper*, 133 Mo. App. 50, 112 S. W. 709. In that case, however, as appears from the opinion, the only argument against the alleged right of plaintiff to partition was that the association constituted a partnership between its members, and that consequently partition would not lie, the remedy being a suit in equity to dissolve the partnership and wind up its affairs. It was held, however, that the members of an association of this character are not partners, but are to be regarded as joint owners of the property within the meaning of section 2619, *supra*. [See also *Primm v. White*, 162 Mo. App. 594, 142 S. W. 802.] But in the case before us the defense is that these plaintiffs cannot maintain a suit for partition until they have complied with the provisions of the constitution and by-laws, particularly with section nine of the constitution, *supra*.

Plaintiffs urge that this provision of the constitution constitutes an unreasonable restraint upon the alienation of a member's share in the association, and is for this reason void. We cannot accede to this contention. The evident object of this and certain other provisions of the constitution is to enable the association to have control over the admission of new members; and in view of the nature of the association—one organized for the convenience of its members and in no wise engaged in business for profit—we perceive nothing unreasonable in its provisions. Nor do we think that plaintiffs are in a position to here question the power of the association, or of its trustees provided for by the constitution, to take title to any share of stock offered to it by a member who wishes to retire from the association. What course would have been pursued had plaintiffs offered their stock to the association we know not; but we regard it as clear that plaintiffs cannot justify their failure to comply with this provision of the constitution by asserting that the association as such cannot acquire title to plaintiffs' shares.

But it is argued that neither section nine of the constitution nor any other provision thereof or by-laws can affect plaintiffs' statutory right to partition of the property in question. We think that this position is untenable. The provisions of the constitution, signed and agreed to by all of the members, became the organic law of the association, and constituted a contract between its members. It is true that had this contract been one attempting to deny *in toto* and forever the right of partition it would not have been effective. [See *Haeussler v. Missouri Iron Co.*, 110 Mo. 188, 19 S. W. 75.] But such is not the nature of the provision of the constitution here drawn in question. It simply provides that a member who wishes to dispose of his share or interest must first offer it to the association. It does not undertake to deprive a member of the right of partition. But its effect, we think, is to annex a condition precedent to the right of a member to maintain partition, operating to postpone such right until

there has been a proper compliance therewith. A contrary view would permit these four members of the association, in disregard of their solemn contract evidenced by the provisions of the constitution to which they gave written assent, to compel a sale of this entire local telephone system, thereby defeating the very object and purpose for which the association was organized. In this connection see *Springer v. Bradley*, 188 S. W. 175; *Eberts v. Fisher*, 54 Mich. 294; *Latshaw's Appeal* 122 Pa. St. 143; *Roberts v. Wallace*, 100 Minn. 359; 30 Cyc. 187.

It follows that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

MATT G. REYNOLDS, Receiver of the CONTINENTAL ASSURANCE COMPANY OF AMERICA, a Corporation, Appellant, v. UNION STATION BANK OF ST. LOUIS, a Corporation, Respondent.

St. Louis Court of Appeals. Opinion Filed February 5, 1918.

1. **ELECTION OF REMEDIES: Application of Doctrine: Inconsistent Remedies.** The doctrine of election of remedies under which the pursuit of one remedy precludes the pursuit of another, applies only to those cases in which a party has two remedies which are inconsistent with each other, and has no application to a state of facts where a party has a right to bring more than one suit.
2. ———: ———: ———: **Actions.** Defendant loaned money to persons who advanced it to the promoter of an insurance company for preliminary expenses. After the incorporation of the company, but before it received its license to do business, and while it was still in process of organization, the promoter, then secretary of the corporation, drew the check of the corporation, and delivered it to defendant in payment of its loan. *Held*, that the corporation had two causes of action, one against the secretary for conversion, and the other against defendant for money had and received, and these remedies were not inconsistent, and by suing the secretary for his failure to account for all moneys belonging to it received by him, it was not precluded from suing defendant.

Reynolds v. Union Station Bank of St. Louis.

3. **CORPORATIONS: Insurance: Insurance Companies: Powers While Organizing: Promoters.** An insurance company which, though incorporated, was still in process of organization, and had not obtained a license to do an insurance business, had no power to assume an indebtedness contracted by its promoters, and persons advancing money to the promoter for preliminary expenses had no claim against the corporation, though the money was used for its preliminary expenses.
4. ———: **Misappropriation of Funds by Officer: Duty to Restore.** One accepting a check from a corporation drawn by an officer thereof in payment of his private obligation takes the risk of being required to restore the proceeds in an action for money had and received in the event that the corporate funds are thereby misapplied.
5. ———: ———: **Actions: Instructions.** In an action by the receiver of an insurance company whose secretary and promoter, while it was a process of organization, delivered its check in repayment of money advanced to him for preliminary expenses, an instruction to the effect that if the jury found that he acted with the consent and authority of the board of directors they should find for defendant was prejudicial error, where the only reference in the testimony to the board of directors was testimony that the board authorized the secretary to act as fiscal agent to sell the stock.
6. ———: ———: **Instructions: Burden of Proof.** An instruction that the burden of proof was on plaintiff to show that the corporation check drawn by an officer thereof in payment of his private obligation was erroneous in that it is the established rule that such a check carries on its face notice of its irregular and illegal character, and the burden was on the defendant to show by evidence that the secretary who thus issued the check of the corporation in payment of his private obligation was either the beneficial owner of the fund or duly authorized to make such payment by those having authority to authorize it.

Appeal from the Circuit Court of the City of St. Louis.

—Hon. William M. Kinsey, Judge.

REVERSED AND REMANDED.

John S. Leahy and *Chase Morsey* for appellant.

(1) The Union Station Bank having accepted the check of the Continental Assurance Company in payment of a note which it sold and endorsed to Harry B. Gardner, the officer drawing the check, took the money of the Assurance Company with knowledge of the fact that it was not Harry B. Gardner's and in this action for money had and received must account for its pro-

ceeds. *St. Louis Charcoal Co. v. Lewis*, 154 Mo. App. 548; *Coleman v. Stocke*, 159 Mo. App. 43; *Bank v. Edwards*, 243 Mo. 569; *Bank v. Orthwein*, 160 Mo. App. 369. (2) At the time the Bank accepted the check of the Assurance Company in payment of the note which it sold to Mr. Gardner the Assurance Company was in the process of organization. It had not sold all of its stock and it had not obtained a license to do an insurance business. It therefore had no authority to do or transact any business of any kind or character whatsoever and all persons dealing with it were bound to take notice of this fact. *Ellerby v. Bank*, 109 Mo. 445; *Taylor v. Louis National L. Ins. Co.*, 266 Mo. 283; *Reynolds, Receiver v. Whittemore*, 190 S. W. 594. (3) The Bank having accepted the check of the Assurance Company in payment of a note sold to the officer drawing the check the burden of proof was shifted to the defendant. The court erroneously instructed the jury that the burden of proof rested upon plaintiff. *Bank v. Edwards*, 243 Mo. App. 553; *Reynolds, Receiver, v. Whittemore*, 190 S. W. 594. (4) The court instructed the jury that the plaintiff was entitled to recover unless Mr. Gardner in drawing the check acted with the consent and authority of the board of directors. There is not a line of testimony in the record showing that Mr. Gardner had this authority. The verdict of the jury is therefore against the evidence. (5) The fifteen hundred dollars furnished by Douglas, Gillespie, Biggs and Caneer and turned over to Gardner on February 24, 1909, did not become an indebtedness of the Assurance Company after it received its charter on April 24, 1909. *Reynolds, Receiver, v. Whittemore*, 190 S. W. 594.

John H. Boogher for respondent.

(1) The respondent did not receive the check in payment for a note sold to Gardner nor in payment by Gardner of any of his private debts, and the rule in *St. Louis Charcoal Co. v. Lewis*, and cases following

it, is not applicable. (2) It was lawful to restore to Caneer and Gillespie the \$1,000 advanced for a stock subscription after the plan was changed under which the subscription had been made, and they could have maintained an action for money had and received for the amount. *Stout v. Hardware Co.*, 131 Mo. App. 520; *Montgomery v. Wise*, 138 Mo. App. 176; *Jenkins v. Clopton*, 141 Mo. App. 74; *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494; *Gaines v. Miller*, 111 U. S. 395; *Moffitt-West Drug Co. v. Richardson*, 92 Mo. App. 515. (3) In view of threatened legal proceedings and for the avoidance of litigation, the act of restoration to Caneer was not only legal but an act of simple justice. Such compromises are conclusive and will be sustained by the courts regardless of the validity of the claims. *Mehrun v. Kuhn*, 61 N. Y. 623; *Kidder v. Horrobin*, 73 N. Y. 159; 13 L. R. A. note p. 601; 15 L. R. A. note p. 439 and cases cited; *Wood v. K. C. Howe Tel. Co.*, 223 Mo. 537. (4) The test in action for money had and received is, would the retention of the money by defendant be unconscionable. It is apparent that the refusal to have returned it to Caneer would have been unconscionable. *Winningham v. Fancher*, 52 Mo. App. 458; *Montgomery v. Wise*, 138 Mo. App. 176; *Central Mfg. Co. v. Montgomery*, 144 Mo. App. 494; *Gwin v. Smurr*, 101 Mo. 553. (5) Under the circumstances this \$1,000 was impressed with a trust in Gardner's hands which the court would impose upon the receiver had they not been restored, and it would be a futile thing to make respondent undergo further litigation when the present judgment is for the right party and does full equity and justice. *Taylor v. Benham*, 46 U. S. (5 How. 233) 12 L. Ed. 130; *Hodge v. Bullock*, 15 R. I. 562; *In re Linforth*, 87 Fed. 390. (6) Appellant is in error in his point 2 in considering the transaction in the light of a sale of the note to Gardner, and there is no rule of law requiring of respondent that he inquire into the consideration if any given by Caneer when he obtained the check in question. The dealing

and business of the bank was not with the Insurance Company. (7) Likewise, appellant is in error with respect to the burden of proof. This burden was fixed upon respondent at the outset. Thereafter it does not change. However the order of proof may shift during the trial, the burden of proof remains where first cast. *Dorrell v. Sparks*, 142 Mo. App. 460; *McCartney v. Ins. Co.*, 45 Mo. App. 373; *Feurt v. Ambrose*, 34 Mo. App. 360. (8) With knowledge of all the facts, the prior suit and judgment in debt against Gardner, with part collected, bars this suit. *Johnson-Brinkman Com. Co. v. Mo. Pac. Ry. Co.*, 126 Mo. 349; *Nanson v. Jacob*, 93 Mo. 331; *Estes v. Reynolds*, 75 Mo. 563; *Stoller v. Coates*, 88 Mo. 514; *Bradley v. Brigham*, 149 Mass. 141; *Farwell v. Meyers*, 59 Mich. 179; *Ewing v. Cook*, 85 Tenn. 332; *Carter v. Smith*, 23 Wis.; *Fowler v. Bank*, 113 N. Y. 450; *Hargadine McKittrick v. Warden*, 151 Mo. 578; *Ideal Concrete Machine Co. v. Bank*, 145 N. Y. S. 119; *Crook v. First Nat. Bank*, 83 Wis. 31; *Welch v. Carder*, 95 Mo. App. 41. (9) The act of Gardner is not to be construed as the payment of a debt but the discharge of trust obligations which the evidence shows were imposed upon him. *Harris Banking Co. v. Miller*, 190 Mo. 640; Such trusts may be established by parol testimony; *Bunel & Heffernan v. Nester*, 203 Mo. 429; *Tiernan's Executor v. Security B. & L. Assn.*, 152 Mo. 135; *Clifford Banking Co. v. Donovan*, 195 Mo. 262. (10) A person who takes payment from a debtor is not bound to inquire into the manner in which the debtor acquired the money to make the payment. *Thomson v. Clydesdale Bank*, 3 A. C. 282, 69 L. T. N. S. 156; 52 L. R. A. note p. 797; (11) The court's instructions for both parties fairly submitted the issues and its verdict should not be disturbed. *Jones v. Thomas*, 218 Mo. 508; *Davis v. Forman*, 229 Mo. 27; *Forman v. Davis*, 229 Mo. 52.

BECKER, J.—This is a suit by the receiver of the Continental Assurance Company of America to recover a payment of \$1000. alleged to have been made to the

defendant from the funds of the company. The petition is in the regular form, for money had and received. The answer is a general denial, and second, further, that the plaintiff is estopped from prosecuting his action against this defendant by having, with full knowledge of all the facts and circumstances attendant upon the transaction referred to in the petition of plaintiff, instituted suit in the circuit court of the city of St. Louis for the recovery of the moneys referred to in the petition of plaintiff (together with other moneys) against one Harry B. Gardner, secretary of the Continental Assurance Company of America, and in said action having recovered judgment against said Gardner.

The case was tried before a judge and a jury and from a judgment in favor of the defendant, plaintiff in due course brings this appeal.

The record in this case is unsatisfactory and meager with respect to certain facts which, perhaps, while not absolutely essential to the case, should have been introduced for a comprehensive understanding thereof by the court and jury. Certain statements of facts are made as a basis for argument in the briefs as though such facts were duly established by the testimony in the record, when in point of fact the record before us is silent thereon.

As to the facts, one Harry B. Gardner, in the early part of the year 1909, interested Messrs. Gillespie, Douglas and Caneer in the organizing of the Continental Assurance Company of America, Gardner agreeing with them that upon their putting up a certain sum to be used for "preliminary expenses," "they were to have so much of the initial stock issued if they would interest themselves in this proposition and help finance it from the start." It appears that on the 24th of February, 1909, the said Douglas, Gillespie and Caneer, together with one Biggs, negotiated a loan at the Union Station Bank of St. Louis upon their joint promissory note, whereby they obtained the sum of \$1500. This \$1500 was turned over to said Gardner; whether or not Gardner at the time knew that the money had been borrowed

from the said bank in the manner above stated is in controversy. However, the money was paid to Gardner and was used for what has been termed "preliminary expenses incident to the organization of the proposed Continental Assurance Company of America," the money being spent for incorporation fees, charter, printing, paper and other incidentals. At the time the money was turned over to Gardner, which was prior to the time the company received its charter, Douglas, Caneer and Gillespie received some kind of a receipt showing that they were to have some sort of stock in the company in an amount not definitely shown by the record. When matters had proceeded to the point where the company was going to apply for its charter, they were advised by counsel that the subscriptions of said Gillespie, Douglas and Caneer were worthless and it would be necessary for them to "renew their subscriptions made under the first arrangement." This each of said parties refused to do with the exception of Caneer who did afterwards become a stockholder in the company. On June 17, 1909, said Gardner made a payment of \$500 out of his own funds to the Union Station Bank, which sum was accepted and applied by the said bank as a payment to the extent thereof on the said \$1500 note of Douglas, Biggs, Gillespie and Caneer.

The Continental Assurance Company of America received its certificate of incorporation from the Secretary of State; it was dated April 4, 1909. Subsequently the board of directors met and Gardner was authorized to act as fiscal agent to sell the company's stock and receive twenty-four per cent of stock sales. Gardner did proceed to sell the stock of the company which had a capital of \$500,000 but never succeeded in selling all of the capital stock of the company and consequently the company at no time received the necessary license to do an insurance business.

It appears that the note held by the Union Station Bank which was originally for \$1500, upon which there remained a balance due of \$1000, was placed by the bank in the hands of John H. Boogher, its attorney,

for collection. Boogher went to the office of the Continental Assurance Company of America to make demand for payment of the balance due on said note from Caneer, one of the makers thereof; Caneer being at that time connected in some capacity with the said Continental Assurance Company. After some colloquy Caneer went into another office in the same suite and returned shortly and handed Boogher a check in the sum of \$1000 dated July 7, 1909, made payable to the order of the Union Station Bank, drawn on the Third National Bank of St. Louis, upon the funds of the Continental Assurance Company of America, and signed Harry B. Gardner, Secretary. Boogher accepted this check and cashed it and paid the bank the proceeds thereof less his attorney's fee.

Boogher testified that there was some discussion at the time he received the check from Caneer as to what he should do with the note. Boogher, as attorney for the Union Station Bank, did deliver the note to Gardner with the following endorsement: "Pay Harry B. Gardner, without recourse on us, Union Station Bank, by John H. Boogher, counsel." Gardner in turn, after receiving the note, turned the note over to A. R. Russell with the endorsement: "Pay A. R. Russell without recourse, H. B. Gardner," and it appears Russell thereafter brought suit on the note against Caneer. It also appears that Gardner had "borrowed \$300 of Mr. Femmer on that note."

With reference to how Gardner had come to issue the company's check for \$1000 to pay off the said \$1000 note, Gardner stated that the makers of the note would not renew their subscriptions for stock in the company, and, "they were threatening to put the company into the hands of a receiver, and I kept insisting that they renew their subscriptions made under the first arrangement, because their old subscriptions were worthless unless ratified under the new charter and I wanted to save the company, and they insisted that I give them their money back, and to avoid trouble I did refund it as I stated."

At the close of all the evidence in the case counsel for plaintiff requested a peremptory instruction that the jury, under the law and the evidence, return a verdict in favor of plaintiff and against the defendant in the sum of \$1000, with interest at the rate of six per cent. per annum from the 18th day of May, 1912, which the court refused. The court submitted the case to jury after giving instructions, and the jury returned a verdict in favor of the defendant and judgment was entered in accordance therewith. Such of the instructions as are necessary will be found set out below in the opinion.

As to the assignment of error that the learned trial court committed error in overruling plaintiff's instruction requested at the close of all the testimony that under the law and the evidence plaintiff was entitled to recover, it is sufficient to say that an examination of this record fails to convince us that the case falls within the limits of the rule of law laid down in the case of *Knisely v. Leathe*, 178 S. W. (Mo.) 453, 1. c. 460. [See, also, *Stevens v. Barber Supply Co.*, 67 Mo. App. 587, 1. c. 589-590; *Murdock v. Ganahl*, 47 Mo. l. c. 137; *Bank v. Railroad*, 172 Mo. App. 678, 155 S. W. 1111.]

We will next consider the earnest and elaborate argument made by learned counsel for respondent, namely, that plaintiff is estopped from prosecuting this action against the defendant by reason of the fact that this plaintiff, the receiver for the Continental Assurance Company of America had, prior to the bringing of this action and with full knowledge of all the facts and circumstances attendant upon the transaction on which this suit is based, instituted suit in the circuit court of the city of St. Louis for the recovery of moneys (the recovery of which is also the basis of this suit) together with other moneys, against said Gardner the secretary of the Continental Assurance Company of America, and in which action the plaintiff (also plaintiff herein) recovered judgment against said Gardner; one of the items going to make up said judgment being the identi-

cal moneys sought to be recovered from the defendant in this case.

The doctrine of election sought to be invoked by the respondent and seeking to bring the instant case within that line of cases which hold that the pursuit of one remedy precludes the pursuit of another, applies only to those cases in which the party has two remedies which are inconsistent with each other and has no application to a state of facts where a party may have the right to bring more than one suit. [Steinback v. Murphy, 143 Mo. App. 537, 128 S. W. 628.]

We are of the opinion that when Gardner signed the check for \$1000 drawn upon the funds of the Continental Assurance Company of America, on deposit at the Third National Bank, and this check was accepted by the Union Station Bank and the bank in turn received the payment thereon and turned the note, payment for which the check was given, over to said Gardner, two causes of action arose in favor of the Continental Assurance Company of America. It could have sued Gardner for conversion; it could have sued the Union Station Bank as for money had and received. As to whether the company, not having at the time the check was given received a license to do business, had the power to elect to take a note such as was taken by Gardner from the bank in satisfaction of a claim for moneys wrongfully paid out of its funds by Gardner, and so could have sued Gardner in replevin and recovered possession of the note, as also the question as to whether the company would have had an action against the Third National Bank for the paying out of the money on the check of Gardner from the funds of the Continental Assurance Company at a time when said company had not received its license to do business, we need not discuss.

But we hold these remedies are not inconsistent, for the Continental Assurance Company filed suit against Gardner alleging that he, while acting as secretary and fiscal agent of the company, received certain moneys which belonged to the company; that

he failed to account to the company or the receiver for the full amount of the moneys so received belonging to the Continental Assurance Company and sued for the balance as being unlawfully retained by Gardner and converted to his own use. Such suit against Gardner cannot be viewed as an affirmation of Gardner's action in paying over the funds of the company to the bank for the payment or the purchase of the note; it is rather a clear disaffirmance of such action on his part, and, unless the company, after obtaining its judgment against Gardner in such a suit, which judgment included the particular item in question in this suit, had obtained satisfaction of the judgment, such company cannot be precluded from its right of action against the defendant herein, and if there had been a partial satisfaction of such judgment the company was still entitled to bring suit against this defendant and recover such balance of the judgment covering this particular item which remained unpaid. This question has been before the Supreme Court of the United States in the case of Milwaukee National Bank v. State Bank, 103 U. S. 668. The court there held, "that the party misappropriating the funds is liable to the plaintiff for such misappropriation and is entitled to credit for such sums as might be collected from those who received the funds or property misappropriated by the defendant." The trial court therefore properly instructed the jury that the prior action of plaintiff against Gardner was no bar to plaintiff's right to recover in this action against defendant.

Appellant assigns as error the giving of certain instructions by the court of its own motion. We set out the instructions, italicizing that portion of each criticized:

"You are still further instructed that if you find that said check was drawn by said Harry B. Gardner, as secretary only of said Continental Assurance Company, *and without further authority from the board of directors of said company*, then said Gardner had no right

to so use the funds of said company, and the company was not bound by his acts."

"You are further instructed that if you believe and find from the evidence in this case that after Caneer, Gillespie and Douglas had paid over to said Gardner the proceeds of said note, and before the organization of the company, they, or any of them, undertook to recede from their subscription to stock therein and demanded of Gardner the return of their money; and if you further find from the evidence that after the organization of the company, Caneer, Gillespie and Douglas, or any of them, still adhered to their determination to withdraw and to demand the return of their money, threatening to institute legal proceedings in case such demand was not recognized, and that thereupon and for the purpose of avoiding litigation, *the said Gardner, acting with the consent and authority of the board of directors of said company, drew said check and delivered, or caused the same to be delivered, to the defendant bank as a means of repaying to said Caneer, Gillespie and Douglas, or any of them, a part of the money which they had paid to said Gardner before the organization of the company, then you should return a verdict for the defendant.*"

It must be remembered that the Continental Assurance Company of America was still in process of organization and had not obtained a license to do an insurance business. And during such period, as was said in the case of Reynolds, Receiver of The Continental Assurance Company v. Whittemore (Mo.), 190 S. W. 594, l. c. 596: "The preliminary corporation had no power to assume an indebtedness contracted by the promoters; and, had the money been afterwards used in connection with securing the subscriptions to the stock, the subscribers would be under no obligation to return it." Furthermore, "Prior to obtaining a license to do an insurance business such organization has no power or authority to do or transact any business of any kind or character whatsoever and all persons dealing with it are bound to take notice

of its limited powers." [Ellerbe v. Bank, 109 Mo. 445, 19 S. W. 241.] And as this court has in a late case, not yet reported, stated: "The rule of decision has long prevailed in this State to the effect that one accepting a check from a corporation drawn by an officer thereof in payment of his private obligation, takes the risk of being required to restore the proceeds thereof in an action as for money had and received, in the event that the corporate funds were thereby misapplied." [McCullam, Trustee in Bankruptcy of Masters Lumber Co. v. Buckingham Hotel Company,—S. W.—, and cases therein cited.] And this applies to the instant case. Douglas, Caneer, Gillespie and Biggs could have no claim for any moneys advanced by them to Gardner, even though such money was used for the payment of the preliminary expenses of such embryonic company, and therefore any check drawn upon the funds of such company prior to its obtaining a license to do business when such funds are a part or portion of the money that is to make up the capital stock of the company, must be held to be accepted with the knowledge of the fact that neither the company nor the officers have the necessary authority to make payments of this nature out of such funds. [Ellerbe v. Bank, *supra*; Taylor v. Insurance Co., 266 Mo. 283, 181 S. W. 8; Reynolds, Receiver v. Whittemore, *supra*.]

Coming then to the question of the criticised instructions, *supra*, we have carefully searched the record for any testimony to base the italicized portions of the above two instructions with reference to the consent of the board of directors on, and fail to find any. The only reference in the testimony to the board of directors in any way, shape or form, is a statement by Gardner that after the charter had been obtained for the company, and when no license for doing business had yet been obtained, "the board of directors met and I was authorized to act as fiscal agent to sell the company's stock and receive twenty-four per cent of stock sales." This statement in nowise can be viewed as warranting the criticised portions of said instructions,

and in view of the entire record with reference thereto, and what we have said concerning the law, and considering the result arrived at by the jury in the case, we hold that the giving of this instruction was prejudicial error.

Further, the court gave an instruction that the burden of proof in the case rested upon the plaintiff. The instruction is subject to criticism in that it is the established rule of decision in this State that a check such as was given by Gardner in the instant case to the Union Station Bank, defendant below, carries upon its face notice of its, "irregular and illegal character." [St. Louis Charcoal Co. v. Lewis, 154 Mo. App. 548, 136 S. W. 716.] And having accepted the check and obtained the money thereon, the burden is upon the defendant to show by evidence that Gardner was either beneficial owner of the fund or duly authorized to make such payment by those having authority to authorize such payment. [See Reynolds, Receiver, v. Whittemore, supra, also, St. Charles Sav. Bank v. Edwards, 243 Mo. 553, 1. c. 569, 147 S. W. 978, and cases therein cited.] Upon a retrial the court should frame its instructions on the burden of proof in accordance with such rule.

The judgment is accordingly reversed and the cause remanded. *Reynolds, P. J.*, and *Allen, J.*, concur.

GUSTAVUS C. STREET and LEROY R. STREET,
Co-partners, Doing Business as STREET AND
COMPANY, Respondents, v. WERTHAN BAG
AND BURLAP COMPANY, a Corporation, doing
Business as ST. LOUIS BAG AND BURLAP
COMPANY, Appellant.

St. Louis Court of Appeals. Opinion Filed February 5, 1918.

1. **SALES, Place of Delivery:** F. O. B., and Freight Paid Synonymous. As fixing the place of delivery, the terms, freight paid and f. o. b., are synonymous.

Street v. Bag and Burlap Co.

2. ———: ———: **Carrier as Agent.** Where a contract of sale of goods was silent as to the railroad over which goods were to be shipped freight prepaid, that the seller complied with a request of the buyer in sending one carload over a certain road, had no bearing on how or where the delivery of the unshipped portion of the order was to be made, because the buyer had no authority to compel the seller to ship by any particular route.
3. ———: ———: **Market Value: Shipment of Goods.** Where an order of good was to be shipped "freight paid to Houston, allowing you 3 per cent discount for cash against document," the point of delivery was Houston, and hence the market value at Houston was the basis of damages for failure to ship.
4. ———: ———: ———: **Failure to Deliver: Damages: Sufficiency of Evidence.** Evidence held sufficient to support a finding that a purchaser of undelivered goods who bought in the open market on September 4th, where the last day for fulfillment of the contract was August 31st, had complied with the established rule with reference to such purchases, and had bought at the market value.

Appeal from the Circuit Court of the City of St. Louis.—
Hon. J. Hugo Grimm, Judge.

AFFIRMED.

Stern & Haberman and H. A. Loevy for appellant.

(1) The court erred in refusing Instruction No. 1 (demurrer to the evidence): (a) Because respondent's damages (if any) should have been based on market value at St. Louis, not Houston (as to which there was not a particle of evidence), because delivery was to take place at St. Louis, not Houston. *Gill v. Com. Co.*, 84 Mo. App. 456; *Rosenberger case*, 212 Mo. 654; *Niemeyer v. Burlington*, 54 Neb. 321, 40 L. R. A. 534; 35 Cyc. 172; *Comstock v. Affelter*, 50 Mo. 412; *Scharff v. Meyer*, 133 Mo. 428; *Bank v. Smith*, 107 Mo. App. 178; *Taussig v. Mill Co.*, 124 Mo. App. 209; *West Glass Co. v. Mo. Glass Co.*, 169 Mo. App. 368; *Austin v. Peycke*, 178 Mo. App. 225; *Corby v. Thompson*, 186 Mo. App. 95; *State v. Scott*, 189 S. W. 1191; *State v. Loeb*, 190 S. W. 299; *State ex*
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rel. v. Dick, 270 Mo. 100; Mark v. Cooperage Co., 204 Mo. 268; Price v. Vanstone, 40 Mo. App. 211; Schwab v. Frieze, 107 Mo. App. 556; Tuttle v. Con. Co., 136 Mo. App. 315; Coal Co. v. Packing Co., 138 Mo. App. 280; Woldert v. Pillman, 191 Mo. App. 25; Northrup v. Cook, 39 Mo. 208-9, 212; Koeltz v. Bleckman, 46 Mo. 321; Rickey v. Tenbroeck, 63 Mo. 567; Bloom v. Haas, 130 Mo. App. 124; Kerwin v. Doran, 29 Mo. App. 403, 404, 410. Time and place of delivery are of the essence of mercantile contracts (citing 115 U. S. 188). Redlands v. Gorman, 161 Mo. 212. (b) Because respondents themselves (not appellant) selected the carrier to receive the goods from appellant at St. Louis, which absolutely and beyond question made the carrier so selected their agent at St. Louis and the goods would immediately become their property. Abs. 75, Defts. Ex. 2. Gill v. Com. Co., 84 Mo. App. 460. When no special instructions are given by vendee, delivery to any carrier usually employed is delivery to the vendee. Louis v. Imhof, 138 Mo. App. 370 and 375. A refusal by vendee in such case to receive shipment is a refusal to receive its own property. Coal Co. v. Packing Co., 138 Mo. App. 282. (d) Even though the record shows that appellant attached sight draft to bill of lading for the only carload shipped and sent them to a bank at Houston with instructions not to deliver bill of lading until the draft was paid, that did not change place of delivery nor rule of law that delivery to carrier is delivery to vendee. Nor could it change contract of purchase. Rosenberger case, 212 Mo. 648, 654, overruling Wingfield case, 115 Mo. 436; Gill v. Com. Co., 84 Mo. App. 460; Storage Co. v. Com. Co., 178 Mo. App. 227; Dick case, 192 S. W. 1023. Such evidence was inadmissible, because it would tend to alter or vary the written contract. Gill v. Com. Co., 84 Mo. App. 460. Title may pass by bill of lading, but right of possession is distinct from that, and may not. Tuttle v. Con. Co., 136 Mo. App. 315; Wheless v. Grocer Co., 140 Mo. App. 584. The vendor has a complete right to retain possession and compel payment before delivery by carrier to vendee. Wheless

v. Grover Co., 140 Mo. App. 584; Estis v. Harnden, 153 Mo. App. 384. Even issue of bill of lading directly to consignee is not conclusive evidence either of title or right to possession. Smith Co. v. Railroad, 145 Mo. App. 406. (e) Besides: that rule if applicable could only be so to the one carload shipped and could not apply to the carloads never shipped, for what breach respondents sue. *Non constat* that the other cars would be shipped that way. (f) Because the market value, whether at St. Louis or Houston, must be determined by market value on last day for fulfillment of contract: August 31st, not any later date, not even September 1st. Gill v. Com. Co., 84 Mo. App. 461; Heller v. Ferguson, 189 Mo. App. 489; Price v. Vanstone, 40 Mo. App. 211. Nor was time to purchase to be extended after August 31st, although respondents were not residents of St. Louis. Gill v. Com. Co., 84 Mo. App. 461. The prices were fixed arbitrarily by respondents and Graves, without regard to any actual sales. The case in that respect is very much like Com. Co. v. Aaron, 145 Mo. App. 308, 316. The evidence for respondents was solely by deposition. In such case appellate courts will pass upon the credibility of the witness. Neil v. Store Co., 149 Mo. App. 57-8. (2) In the absence of any evidence of market value in St. Louis on August 31st, respondents were entitled to nominal damage only. Wall v. Ice Co., 112 Mo. App. 666; Eaton v. Coal Co., 178 Mo. App. 320; Weber v. Squier, 51 Mo. App. 603. (3) The court erred in refusing instruction No. 2, which was based on a manifest fatal variance between the *allegata* and the *probata*. Cole v. Armour, 154 Mo. 333, 350-1. (4) The court erroneously ruled out evidence of expert railroad witness Amos as to meaning of terms "F. O. B. Houston" and "Fright paid to Houston." Evans v. Mfg. Co., 118 Mo. 553. Such meaning is sought for and adopted by the courts even where the terms are not ambiguous in their ordinary sense. Baer v. Glaser, 90 Mo. App. 294. In a jury-waived case, strict rules of evidence are relaxed. Bloom v. Haas, 130 Mo. App. 128.

Bates H. McFarland and Hutcheson & Hutcheson
for respondent.

(1) The court did not err in refusing the demurrer to the evidence because the measure of plaintiff's damages was the difference between the contract price and the market value at Houston, which was the place of delivery under the contract. As a general rule, delivery to the carrier at the point where the goods are located is delivery to the consignee. But this rule does not prevail (1) if the consignor pays the freight; (2) if the bill of lading is not to be delivered until draft thereto attached has been paid; or (3) if other facts indicate a different intention of the contracting parties. Each of these exceptions to the general rule is applicable to the case at bar, and we shall consider them in their order. (a) When the seller pays the freight the carrier thereby becomes his agent and the presumption is that the delivery is to be made at the place of destination. Williston on Sales, sec. 280, page 406; 35 Cyc. (Sales), p. 174; 24 Amer. & Eng. Ency., pp. 1050, 1071; *Hunter v. Kramer*, 71 Kans. 473; *Brewing Ass'n v. Nipp*, 6 Kans. App. 730; *Devine v. Edwards*, 101 Ill. 141; *Murray v. Mfg. Co.*, 11 N. Y. Suppl. 734; *Suit v. Woodhull*, 113 Mass. 394; *McLaughlin v. Marston*, 78 Wis. 677; *Berger v. State*, 50 Ark. 24; *Detroit So. Ry. v. Malcolmson*, 144 Mich. 172; *Capehart v. Furman*, 103 Ala. 671; *Miller v. Seaman*, 176 Pa. St. 291, 296; *State v. Swift & Co.*, 198 S. W. R. 457, l. c. 458 (St. Louis Ct. of App.); *Taussig v. So. Mill & Land Co.*, 124 Mo. App. 209, l. c. 216. (b) If the bill of lading is not to be delivered until draft thereto attached has been paid, the title does not pass until payment of the draft and the place of payment is the place of delivery. *Howard v. Haas*, 131 Mo. App. 501; *Roaring Fork Potato Growers v. Produce Co.*, 193 Mo. App. 653, 187 S. W. 617; *Moore on Carriers*, p. 171; 35 Cyc. (Sales), 195-196, 317 and 321; *Bank v. Homeyer*, 45 Mo. 149-50; *Bergman v. Railway Co.*, 104 Mo. 85; *Milling Co. v. Stanley*, 132 Mo. App. 308, 311; *Bank v. Milling Co.*, 163 Mo. App. 135, 143; R. S. 1909, sec. 11957; Grain

Co. v. Grain Co., 171 Mo. App. 354; Aspegren Co. v. Wallerstein Co., 111 Va. 570 (where the contract was actually f. o. b. point of shipment); Dows v. Nat'l Exch. Bank, 91 U. S. 618. When a sale is made for cash on delivery the transaction is not complete until the price is paid, nor does the title pass until then. Strother v. Lumber Co., 200 Mo. 656; Johnson-Brinkmann Co. v. Bank, 116 Mo. 570; Johnston v. Parrott, etc., 92 Mo. App. 199. The exception applicable to C. O. D. shipments of liquor is not supported by sound logic; and apparently arises out of the criminal character of these actions, and the rule of strict construction therein. Tiffany on Sales, page 100; Commonwealth v. Fleming, 130 Pa. St. 162. (c) The intention of the parties controls, and delivery to the carrier is not delivery to the buyer if the circumstances of the transaction indicate a different intention. Thomas v. Ramsey, 47 Mo. App. 85, 98; Fairbank Co. v. Railway Co., 167 Mo. App. 286; 1 Meecham on Sales, sec. 740; Austin Cold Stor. Co. v. Peycke Com. Co., 178 Mo. App. 232; Davis v. Alpha Cement Co., 134 Fed. 278. The evidence in the case at bar clearly shows that the intention of the parties was for delivery at Houston, and the finding of the trial court, sitting as a jury, will not be disturbed on appeal. Thomas v. Ramsey, *supra*, page 98. Even where the written contract provides for delivery at point of shipment, if the other circumstances of the case show that the real intention of the parties was that the seller was to retain control to the destination, the latter will be deemed the point of delivery. Fairbank Co. v. Railway Co., *supra*. (d) The verdict of a jury or the finding of a trial judge sitting as a jury in an action at law is conclusive upon the appellate court, even where the evidence is wholly by depositions. State ex rel. v. People's Ice Co., 247 Mo. 205; Handlan v. McManus, 100 Mo. 124, 128; Neill v. Store Co., 160 Mo. App. 518, (overruling Neill v. Store Co., 149 Mo. App. 57, cited by appellant). Where a jury is waived and the case is tried before the court, error seldom lies to the giving or refusing of declarations of law. Neill v. Store

Co., 160 Mo. App. 513. The evidence as to market value at Houston is substantial and entirely uncontroverted, was admitted without objection, and is conclusive on appeal. *Smith v. Baer*, 166 Mo. 406, 407. The price was not arbitrarily fixed by respondents and Graves, but, on the contrary, respondents did what they could to minimize appellant's loss by procuring as much of the bagging as was available in the near-by market of Galveston (*Abs.*, p. 54). In so doing they observed the rule laid down in *Taussig v. Mill Co.*, 124 Mo. App. 209, 219. (2) The place of delivery under the contract, as interpreted by the parties themselves, was Houston. The price was a Houston price. It was therefore not incumbent on respondents to prove the market value in St. Louis on the date of the breach. See authorities under 1 above. (3) The court did not err in refusing instruction No. 2, because there was no material variance between allegations and proof. The petition does not allege that the contract was in terms "F. O. B. Houston," but that the goods were to be delivered at Houston "freight prepaid" (*Abs.*, p. 5). The term "F. O. B. Houston" is used in another connection in the petition. However, there is no substantial difference between the two expressions. *Meecham on Sales*, sec. 795; *Capehart v. Furman Farm Co.*, 103 Ala. 671; *Chandler Co. v. Radka*, 136 Wis. 498. (4) The court did not err in striking out the testimony of the witness Amos as to meaning of the terms "F. O. B." and "Freight paid." (5) The contract price of 8½ cents per yard included all the elements of cost, transportation and profit deemed adequate by the seller to lay it down in Houston. It was therefore a Houston price, and on breach of the contract the buyer was justified in measuring his damage by the Houston price at the time of the breach. *Sheffield Furnace Co. v. Hull Coal Co.*, 101 Ala. 482; *Sterling Coal Co. v. Silver Springs Co.*, 162 Fed. 852.

BECKER, J.—On June 30, 1913, the defendant company, located at St. Louis, Missouri, under its trade name, St. Louis Bag and Burlap Company, sold to the

plaintiffs, located at Houston, Harris County, Texas, 300 bales of bagging known as sugar cloth, the contract of sale being evidenced by correspondence exchanged between the said parties. Plaintiff sued defendant for damages in the sum of \$1215, for the alleged failure to deliver 250 of 300 bales purchased. It is alleged that plaintiffs, upon the breach of the contract by defendant, were forced to and did purchase 250 bales of bagging in lieu of that contracted to be delivered by the defendant, but which the defendant failed to deliver.

The answer was a general denial. The case was tried before the court without the intervention of a jury. From a judgment in favor of plaintiffs and against the defendant, in the sum of \$1259, being the amount sued for with interest, the defendant brings this appeal.

The written contract relied upon by plaintiffs was evidenced by correspondence. We will set out that portion of the correspondence which we consider material.

Plaintiffs, on June 9, 1913, wrote the defendant company: "Please quote us in lots of 500 to 1000 bales, f. o. b. Houston and Galveston. You understand that we want this bagging to be 44 inches to 46 inches in width and in strips 6 yards long, packed 50 pieces to the bale." Defendant answered on the 11th of June, 1913: "We are pleased to advise you that we can quote you this bagging in 6 yards strips, packing 50 pieces to a bale—bagging to run from 42 inches to 46 inches wide, at 8½ cents per yard, freight paid to Houston, allowing you 3 per cent discount for cash. Please advise by wire if you can use same." On June 30th, plaintiffs wired defendant: "Your letter 11th. Name lowest price 1000 bales, July, August shipment on our order." Defendant answered by wire the same day: "Our price 11th lowest on 300 bales shipment July and August, subject to wire acceptance." Plaintiffs replied on the same day by wire: "Offer 8¼ cents, less 3 per cent on 300 bales mentioned. Wire acceptance." On the same day the defendant replied by wire: "Wire received; our price 8½ cents, less 3 per cent best on cloth; wire acceptance."

Plaintiffs by wire replied on the same day: "Offer accepted." Plaintiffs confirmed this telegram of acceptance by letter; and the defendant in turn sent plaintiffs the following letter of confirmation accepting the order: "June 30, 1913. Street & Co. We beg to acknowledge receipt of your wire of even date and have entered your order for 300 bales of bagging cloth in 6 yard strips to be packed 50 pieces to the bale, cloth to run from 42 inches to 46 inches wide at 8½ cents per yard, freight paid to Houston, allowing you 3 per cent. discount for cash against document. Cloth to be shipped during July and August. . . ."

Considerable correspondence between the parties was introduced which showed that the plaintiffs were continually urging the defendant to hurry up the order and ship the bagging purchased as quickly as possible. It further appears that the defendant, on July 26th, notified the plaintiffs that it had shipped a car of bagging, giving the car number and the route. However, on August 4th, the defendant, by letter, wrote the plaintiffs that when they, "started to invoice your car we found that our party shipped us 3 yard strips instead of 6. We trust that you can use these this length, otherwise it will cause considerable delay. This car has been on the road now for ten days." Plaintiffs immediately wired, upon receipt of the letter: "Cannot use 3 yard strips. Suggest you take up with H. W. Garrow & Company, Houston, to whom you might sell as patches." The defendant replied by letter of August 5th, acknowledging receipt of the wire, and advising that it had diverted the car and stated that, it would, "be able to let you have a car in the next few days from what information we have."

On August 19, 1913, the defendant did ship one car containing 15,000 yards of the bagging to the defendant, via. the St. Louis, Iron Mountain and Southern Railroad, which car reached Houston, Texas, on August 27th. On August 21st, one of the banks in Houston presented a draft with bill-of-lading for said carload of bagging attached, the draft being drawn by the

defendant on the plaintiffs. Plaintiffs did not pay the draft at once, and gave as their reason that they did not consider, from the terms of the contract, that the goods were to be paid for until they were delivered. They, however, wired defendant on August 21, 1913, to direct the bank to hold the draft until the delivery of the goods. Defendant replied by telegram on the same day: "Wire received. Contract calls less 3 per cent for cash. Draft should be paid on presentation." Plaintiffs replied by wire on the same day; "Telegram received. Must insist that you wire bank to hold draft for arrival of goods, as we understand shipment has not yet left St. Louis, and we do not intend to pay in advance for the goods." To this defendant replied: "Wire received; contract calls for 3 per cent less for cash; if you are willing to waive discount, will have bank hold draft for arrival. If car has not left St. Louis, fault of the railroad, not ours; same is not being held." The plaintiffs answered by wire: "Answering night letter, will waive the 3 per cent." Defendant wrote a letter to plaintiffs on August 22nd, as follows: "Acknowledging receipt of your wire of even date we have had our bank to advise their correspondent to hold your draft and draft will be with 3 per cent added. We have had the Iron Mountain on the phone and find you are correct, the car has not left St. Louis. Will you kindly advise us where you got this information? We will send you the correspondence from the Iron Mountain showing that the blame lays entirely with them and not with us. As it was our intention to ship these goods over the M. K. & T., you are the ones to blame, as you requested us to route the cars Iron Mountain."

The car on arrival was inspected and paid for. There was testimony to the effect that the contents of the car did not in all respects conform to the contract, namely, that the cloth itself was not strictly up to the sample originally submitted, and the bales were not of the size agreed upon, namely, the contract called for 300 yards to the bale while the bales in the car

shipped were but half the size stipulated, containing 150 yards to the bale; but plaintiffs, on the whole, were satisfied with the car.

No further bagging was shipped by the defendant to the plaintiffs, and on September 2, 1913, plaintiffs wired defendant: "Shall we buy for your account balance bagging due us. Answer." And on September 4th wired: "You having shipped only 50 bales of our purchase of 300, shipment July—August, we have had to buy for your account balance, and we propose to hold you for the difference in price for failure in complying with your contract." The defendant answered by wire on the same day: "Wire received; see letter third; you refused pay on draft as per contract; we couldn't afford to ship until we know that you would accept the goods; we will not be responsible for any purchase you may make; if you want us to ship you any more cloth, wire." Defendant confirmed this wire by a letter on the same day as follows: ". . . We will not be responsible for any gunny you may buy for our account as we have given you no authority to do so. The very first shipment that we made you you turned down our draft. Still, as we did not want to have any hard feelings, we were willing to go ahead and fill the contract for you. Of course if you are not willing to let us fill the contract, well and good. If you are, we will do so, but may be a little bit delayed, but we think you will be better off to be delayed than to try to force this matter, as, after refusing the car that we did ship you we do not think you have any kick against us for not shipping any more until we found out how we were going to come out on this." Plaintiffs, on September 4th, by letter, notified the defendant that they had bought the balance of the gunny sack bagging, namely, that portion which defendant had failed to ship under the contract which amounted to 75,000 yards; that they had bought the bagging in two lots; one lot of 200 bales, or 60,000 yards, they had bought at 9-7/8 cents per yard, F. O. B., Houston; the other lot 50 bales, or 15,000 yards, at 9-3/4 cents, Galveston, which is equiva-

lent to 9-85/100 cents Houston, and in the letter plaintiffs enclosed the bill for the difference between the contract price and the price which plaintiffs had thus paid, which aggregated \$1215.

The last day for fulfilling the contract was August 31, 1913 and it fell on a Sunday; and it was admitted September 1st was Labor Day, a holiday; on September 2nd the plaintiffs took an option for 200 bales of bagging from a Houston concern and exercised this option on the 4th of September and bought said amount, and the balance, namely 50 bales, plaintiffs purchased on September 4th at Galveston. A witness for plaintiffs testified that the price on the first four days of September of that year on this character of cloth for bagging was the same, and that the plaintiffs, before purchasing the bagging for the account of the defendant, obtained quotations upon the same from Graves & Company in Houston, and C. F. Schwille & Company in Galveston, each of which concerns was a large dealer in that particular commodity, and that the prices paid were the reasonable value of the goods at the time and place.

Appellant's chief assignment of error is that the court erred in not sustaining its demurrer to the evidence, and that on the ground that the plaintiffs' damages, if any, should have been based on the market value at St. Louis and not at Houston, because delivery was to take place at St. Louis and not at Houston. The ingenious argument is made by learned counsel for the appellant that there is a clear cut distinction and difference between the terms, "F. O. B., Houston" and "freight paid to Houston," that "F. O. B. Houston" would mean the goods would have to be delivered by the seller of the merchandise in question at Houston, F. O. B., and the carrier in such event would be the agent of the seller for delivery of the goods at such point, whereas the term, "freight paid to Houston," means nothing more or less than indicating the destination, and that appellant would pay the charges, so that when it delivered to the carrier at St. Louis, freight charges prepaid, the goods *ipso facto* became the prop-

erty of respondents and the carrier thereby became the agent of respondents for delivery to them at Houston." We have searched the adjudicated cases and text books to find a precedent for such a distinction between these terms as is argued exists, but without avail. We are of the opinion that the term, "F. O. B., Houston," and the term, "freight paid to Houston," for the purposes and under the facts in this case are synonymous.

It will be noted that in the letter of June 9, 1913, plaintiffs wrote the defendants: "Please quote us on lots of 500 and 1000 bales *F. O. B., Houston and Galveston*," and that by letter of June 11, 1913, the defendant replied that it was pleased to advise that it could, "quote this bagging at 8-1/2 cents per yard, *freight paid to Houston*, allowing you 3 per cent discount for cash," which offer was finally accepted by the plaintiffs and the acceptance of the order confirmed by defendant by its letter of June 30, 1913, in which the defendant again states the price to be 8-1/2 cents per yard, "*freight paid to Houston*, allowing you 3 per cent discount for cash against document; cloth to be shipped during July and August." We have no doubt but that, "F. O. B., Houston" and "freight paid to Houston," were considered by both parties as synonymous terms.

The appellant, however, contends that it has adduced sufficient proof to show that the only car of bagging which it shipped the respondents was routed over the St. Louis, Iron Mountain and Southern Railroad at the request of the respondents. It is true the record contains defendant's letter directed to plaintiffs, dated August 22, 1913, which contains the sentence: "As it was our intention to ship these goods over the M. K. & T., you are the ones to blame as you requested us to route the cars Iron Mountain." It is argued that this letter is sufficient to bring the case within the rule that, "if the purchaser selects the carrier by which the shipment is to be made to the purchaser, the carrier is deemed the purchaser's agent to receive and transport the goods." In support of this contention we are re-

ferred to the cases of Gill & Fisher v. Comm. Co., 84 Mo. App. 456; Scharff v. Meyer, 133 Mo. 428, 34 S. W. 858; Griffith v. K. C. Co., 46 Mo. App. 539 and Meyer Bros. v. McMahan, 50 Mo. App. 18.

The Gill & Fisher case we find not in point for there the contract specifically provided, "F. O. B. Q. cars Kansas City . . . Please load large cars and 10 per cent. over marked capacity." The seller lived in Kansas City and the commodity was being shipped to Baltimore, Maryland, as its destination. The Chicago, Burlington & Quincy was specifically designated in the contract as the carrier and the *consignee* was to pay the freight from Kansas City to destination.

In the Scharff case the Meyer Company, defendant therein, sugar merchants in the city of New Orleans, had sold fourteen different lots of sugar to as many different purchasers in the city of St. Louis. All of the sugar was shipped on the same boat from the Cora Plantation, Louisiana. Scharff, et al., the plaintiffs, creditors of Meyer Company, brought an action by attachment and seized all of the sugar in question as the property of the defendant, whereupon the Union National Bank of New Orleans interpleaded claiming the fund derived from the sale of the sugar attached, by reason of having purchased fourteen drafts of the defendant company, one draft covering each of the fourteen different lots of sugar, to each of which drafts was attached the corresponding bill-of-lading for such lot of sugar. Each of the bills-of-lading, it appears, was made out in the name of the *consignee*. *Of these fourteen lots but four of them designated the place of delivery as St. Louis* and as to them the court (l. c. 448) says: "Under the contracts with respect to lots numbered 1, 3, 2 and 4, the first two lots were to be delivered on the levee in St. Louis and the last two in said city, no other place being named. Notwithstanding the bills-of-lading for these sugars were also made in favor of the respective consignees, the contracts not only show that they were to be delivered in St. Louis, but also show that they were sold at about one cent on

the pound in advance of other sugar shipped at the same time in contracts to be delivered on the vessel, which tended to show, aside from other facts and circumstances in the case, that the consignors retained title thereto and that they were shipped at their risk. If so, while in transit, the carrier was their agent. [Benjamin on Sales (Kerr's Ed.), sec. 925; Dunlop v. Lambert, 6 Cl. & F. 600.] This, however, is a matter depending largely upon the intention of the consignors and a question for the consideration of the court or a jury."

A careful reading of the Griffith case discloses that the point in question is not therein discussed, whilst the Meyer Bros. case is not in point in that there is no provision that the seller was to pay the freight to destination.

In the instant case not only does the contract specifically provide that the freight to Houston, the destination, shall be paid by the consignor, but the contract is entirely silent as to the selection of any carrier by which the shipment is to be made. The fact that the one car of bagging which was actually shipped by the defendant to the plaintiffs, was shipped over the Iron Mountain, even though the record disclosed that the purchaser had directed shipment by that route, but to which we do not agree, would have no bearing under the facts in this case upon the unshipped portion of the order. Under the contract it is plain that the carrier was not designated therein and the purchaser had no authority to compel the seller to ship by any route which he, the purchaser, might designate.

Williston on Sales, sec. 280, with reference to the question states (page 406): "Whether by the terms of the contract the seller is authorized to make a final appropriation of the goods to the buyer by delivering them to the carrier at the point of shipment, or whether the duty of the seller is to deliver the goods at their destination, the risk of transportation being upon him, is a question of fact. If the contract specifies that one party or the other is to pay the freight, this almost

certainly indicates the intention of the parties in regard to the matter. If the buyer is to pay the freight, it is a reasonable supposition that he does so because the goods become his at the point of shipment and the carrier is his agent in transporting them. On the other hand, if the seller is to pay the freight, the inference is equally strong that the duty of the seller is to have the goods transported to their ultimate destination and that the carrier is his agent in transporting the goods. Accordingly, if the seller is to pay freight, the presumption is that the property does not pass until the goods have reached their destination."

In 35 Cyc., 174, we find the following: "Ordinarily, when goods are to be shipped by the seller and at his expense, to the place of business of the buyer, such place in the place of delivery." [See, also, *Hunter v. Kramer*, 71 Kan. 473; *Devine v. Edwards*, 101 Ill. 141; *Murray v. Mfg. Co.*, 11 N. Y. Supp. 734; *Suit v. Woodhall*, 113 Mass. l. c. 394; *McLaughlin v. Marston*, 78 Wis. l. c. 677; *State v. Swift & Co.*, 198 S. W. (Mo. App.) 457, l. c. 458; *Taussig v. So. Mill & Land Co.*, 124 Mo. App. 209, l. c. 216, 101 S. W. 602, and cases therein cited.]

There are other facts in the case which tend to show that the point of delivery was Houston, namely, the fact that the contract read: "Freight paid to Houston, allowing you 3 per cent discount for cash against document." The intention of the parties thereby being shown to be that the bills-of-lading were not to be delivered until the drafts to which they were attached should have been paid. [See *Howard v. Haas*, 131 Mo. App. 499, l. c. 501, 109 S. W. 1076; *Roaring Fork Potato Growers v. Produce Co.*, 193 Mo. App. 652, 187 S. W. 617.]

In view of the written contract, together with the other facts in the case, we must rule this assignment of error against the appellant and hold that the court did not err in overruling defendant's demurrer to the evidence. The evidence shows that the delivery was to take place at Houston and not at St. Louis, and there-

fore the market value at Houston and not at St. Louis was the basis of plaintiffs' damages.

As to the point made by the appellant that the respondents failed to establish, by substantial testimony, the market value of the bagging purchased by them for the account of the appellant at Houston, and that the purchases were made on September 4th at Houston and Galveston instead of on August 31st, the last day for the fulfilment of the contract, we hold there is ample testimony to support the finding of the trial court, that plaintiffs had complied with the established rule with reference to such purchases.

We have examined the other assignments of error raised by the appellant but find them without merit and the judgment being for the right party it is accordingly affirmed. *Reynolds, P. J., and Allen, J., concur.*

TONY F. TROWER, a minor, by ABRAHAM TROWER, next friend, Respondent, v. THE CITY OF LOUISIANA, Appellant.

St. Louis Court of Appeals. Argued and Submitted January 8, 1918.
Opinion Filed February 5, 1918.

1. **MUNICIPAL CORPORATIONS: Nuisances: Street Obstruction.** One cannot recover from a city for a street obstruction even though a nuisance, its allowance being a wrong common to the public.
2. ———: ———: ———: **Injuries.** One injured by a stray bullet from a street carnival shooting gallery operated by permission and with knowledge of city officers cannot recover from the city.
3. ———: **Police Powers: Liability for Street Obstruction.** Municipal corporations are liable for injuries caused by street obstructions; but such liability is fixed upon the city, not by reason of its violation or disregard of its police powers, nor the doing of acts in connection with its police powers, but by reason of its failure and neglect to properly discharge its corporate duties apart from the duty it owed as a municipality.

Trower v. City of Louisiana.

4. ———: **Liability for Injuries Arising from Malfeasance or Nonfeasance of Corporate Officers.** One injured by a stray bullet from a street carnival shooting gallery cannot recover damages therefor from the city; since, in the exercise of the city's public functions, it was not liable for the nonfeasance or malfeasance of its officers in permitting such an exhibition as a street carnival, and not abating the shooting gallery as being a dangerous part of the exhibition.

Appeal from the Circuit Court of Audrain County.—
Hon. James D. Barnett, Judge.

REVERSED.

James E. Pew, James W. Buffington and Robt. A. May for appellant.

The objection to the introduction of any evidence should have been sustained, and the demurrer to the evidence should have been given, because: (1) Plaintiff bases his cause of action solely on the negligence of defendant in permitting an unlawful obstruction, to-wit, a shooting gallery, to be placed on one of its streets. He does not charge that the alleged permitting of the shooting gallery to be placed there, or that the shooting gallery itself, or the operation thereof, caused the injury, but he alleged that a bullet fired in said shooting gallery caused the injury. (2) The defendant city is not liable for failure to prevent a violation of the law, nor for failure to enforce its ordinances. (3)(a) Plaintiff contributed directly to his injury by voluntarily placing himself knowingly in a dangerous position. (b) Plaintiff was injured while a spectator, in attendance at the shooting gallery, to witness the shooting and enjoy the pleasure that the shooting afforded, and was not a traveler upon the highway.

R. D. Rodgers, Hostetter & Haley and Pearson & Pearson for respondent.

(1) The practice of challenging the sufficiency of the petition on oral objection to the introduction of evidence is not favored, and is available only when it

is fatally defective, after verdict. *Bybee v. Dunham*, 198 S. W. 190, 191; *Porter v. Ill. S. Ry. Co.*, 137 Mo. App. 293, 296; *Johnson & Co. v. Springfield Ice Mfg. Co.*, 143 Mo. App. 441, 451; *Price v. City of Maryville*, 174 Mo. App. 698, 701-2; *Downes v. Andrews*, 145 Mo. App. 173, 180; *Wilkinson v. Misner*, 158 Mo. App. 551, 555; *Thomasson v. Mer. Town Mut. Ins. Co.*, 114 Mo. App. 109, 119; *Price v. City of Maryville*, 174 Mo. App. 698, 701-2; *Wiley v. Wiley*, 182 S. W. 108; *Hays v. Miller Est.*, 189 Mo. App. 72, 77. A petition charging negligence generally, in the absence of a motion to make certain and specific, or an objection to its efficiency prior to a verdict, is good after verdict. *Morgan v. Mulhall*, 214 Mo. 451, 457; *Peter v. Gilly Mfg. Co.*, 133 Mo. App. 412, 418. Where an essential fact may be fairly implied from the petition, though not directly alleged, the defect is cured by verdict. *Moellman v. Gieze-Henselmeier Lumber Co.*, 134 Mo. App. 485, 489; *Thomasson v. Mer. Town Mut. Ins. Co.*, 217 Mo. 485, 497. After the verdict the court will not construe the petition most strictly against the pleader, but the pleading will be liberally construed with the view of substantial justice. *Oglesby v. Mo. Pac. Ry. Co.*, 150 Mo. 137; *Cobb v. Lindell R. R. Co.*, 149 Mo. 135, 155; *McKinney v. Northcutt*, 114 Mo. App. 146, 160-1. (2) The city was liable for a dangerous, stationary, obstruction in its streets. A city owns and controls its streets as a trustee for the public. It therefore, stands charged by the law with the primary and bounden duty of keeping them free from nuisances, defects and obstructions, caused by itself, or by third parties, if it (in the latter instance) had actual or constructive notice thereof in time to abate the nuisance, remove the obstruction or repair the defect. It cannot shirk that duty or shift it over to, or halve it with others. So much is clear law in Missouri. *Welch v. St. Louis*, 73 Mo. 71; *Oliver v. City of K. C.*, 69 Mo. 83; *Carrington v. St. Louis*, 89 Mo. 208; *Russell v. Columbia*, 74 Mo. 480; *Beaudin v. Cape Girardeau*, 71 Mo. 395, et seq., and cases cited; *Streator v. Breckenridge*, 23 Mo. App. 250; *Hill v.*

Sedalia, 64 App. l. c. 501, et seq. Benton v. City of St. Louis, 217 Mo. 687, 700; Lindsey v. Kansas City, 195 Mo. 166, 178; Merritt v. Telephone Co., 215 Mo. 299, 311; Buttron et al. v. John C. Bridell, 228 Mo. 622, 630.

STATEMENT.—The city of Louisiana was incorporated and organized under a special charter granted by the General Assembly of this State, the prior Acts incorporating the town being amended and reduced to one Act, under which it was incorporated as a city in 1849 (see Acts 1848-49). The Act of incorporation was declared to be a public Act, the provisions of which the courts take judicial notice. Referring to that Act it appears that the corporate powers are vested in a city council, consisting of two members from each ward, the chief executive officer of the city being designated as a mayor, to be elected by the qualified voters of the city. Among the other duties incumbent upon the mayor were to take care that the laws of the State and the ordinances of the city were duly enforced, respected and observed. The city council is empowered, among other things, to prevent and remove nuisances, to keep in repair the streets, to license, tax, regulate and suppress theatrical and other exhibitions, shows and amusements, to establish, support and regulate the night watch and patrol, to regulate the police of the city, to remove all obstructions from the sidewalks, to prevent and remove all encroachments into and upon all streets established by law, and generally, to make rules, regulations, by-laws and ordinances for the purpose of maintaining the peace, good government and order of the city and enforce the observance thereof by inflicting penalties and generally to make all ordinances necessary and proper for carrying into effect the powers conveyed by the law in the corporation. There may be subsequent amendments to this charter but our attention has not been called to any here material.

It appears that the mayor entered into a contract with an amusement company to put up and conduct in

the streets of the city what is known and commonly referred to as a street carnival. Among other attractions set up in connection with this carnival, was a shooting gallery, which was located on the corner of Fourth and South Carolina Streets, extending some twelve feet north along Fourth Street where South Carolina Street crosses it, and alongside of the City Hall and Court House. This gallery appears to have been inclosed with canvas running up and down the sides, with a canvas top and boards where the guns rested, then a piece of sheet iron at the back of it and pine strips at the edge of this sheet iron. It was equipped with figures of birds and animals and with target guns. The Carnival, it appears, was set up or inaugurated Monday, September 14, 1914, and was to run for a week. On the day that it was set up Tony F. Trower, referred to here as plaintiff and respondent, although he sues by next friend, duly appointed, the boy then being in his 13th year, with two companions, came from their homes in the northwest part of the city of Louisiana, about sixteen blocks from where this carnival was located, to look at the various features of the carnival. Reaching the scene between 7 and 8 o'clock in the evening they wandered about, looking at the various attractions and started home about 9 o'clock of that evening, walking north on Fourth Street. They apparently passed the shooting gallery and heard shooting going on in it but they say they did not go into it. They stopped for a few minutes listening to the talk of a drunken man, who was confined in the calaboose in the basement of the City Hall. While standing there listening to the man talking they saw that there were pieces flying from the lead bullets fired from the gallery, which hit the wall of the Court House, the bullets striking the wall above and two or three feet ahead of them, the gallery being behind them. After stopping and listening to the man talking, they started north on Fourth Street towards home. Plaintiff testified that they had stood right close to the building to keep from getting hit by the bullets, knowing that if they did

not walk close to the wall they were liable to get hit by the bullets. After they had passed the window of the calaboose and walked north along Fourth Street a few feet from the window, plaintiff was hit in his left eye by a splinter, evidently from one of these bullets, producing an injury which necessitated the removal of the eye. That was done a couple of days after the accident and the boy was confined to his bed and to his house for a number of weeks and has suffered the entire loss of his left eye, there being some evidence to the effect that there was danger of infection from that wound which might extend to the right eye and impair the vision from that. There is no question in the case as to the extent of the injury of the boy.

It appears that this carnival was being conducted under a contract purporting to have been entered into by the mayor with the proprietors of the carnival, and attested by the clerk, under which, in lieu of the license fee for conducting the public amusement, a percentage of the receipts were to be paid the city. This contract is not in the abstract before us, although it appears to have been offered in evidence, and whether admitted in evidence or not is not clear, although it was objected to by the defendant. It seems to have been presented and read to the city council and a note to that effect appears on the minutes, but the council took no action on it one way or the other. It also appears that when it was brought to the attention of the city council, one of the members of the council stated its purport, in that it had been agreed by it to allow a carnival company to show in the city the following week and in lieu of a license the city was to receive 25 per cent. of all concessions, 10 per cent. of the shows and 7 and a half per cent. of riding devices and gross receipts. It appeared by oral testimony that the matter of entering into the contract was discussed by the other members of the council at that meeting, but that no formal action was taken in regard to it. However, it, as signed, was filed in the office of the city clerk. It also appears that the attractions of the carnival had

been advertised in the city before its arrival. It further appears that the mayor, possibly the city marshal and some of the city police, were aware of the presence not only of the carnival and its various exhibits but of the setting up and use of this shooting gallery.

Plaintiff introduced and read in evidence an ordinance, the part of which quoted in the abstract under the head of "Duties of the Mayor," being "He shall take care that the laws of the State and the ordinances of the city are duly enforced, respected and observed within the city." Plaintiff also introduced and read in evidence another section of this ordinance under the head of "Police," the part read being: "It shall be the duty of the city marshal and all policemen to obey punctually and to the best of their ability the the orders of the mayor and the police committee to to preserve the peace. . . . It shall be the duty of the city marshal and of policemen to obey punctually and to the best of their ability the orders of the mayor and the police committee to preserve the peace, good order and quiet through the city, to arrest all persons seen in the act of violating any ordinance of the city and report at once to the mayor of the violation of any city ordinance or ordinances and all facts and circumstances connected therewith." Other parts of the ordinance as to the duties of policemen, it seems were offered and read but are not in the abstract. All of these ordinances as offered and when offered were objected to on the part of defendant on the ground that these ordinances and all of them, relating to the duties of the police officers and other officers about enforcing the laws of the city of Louisiana, were irrelevant for the reason that the defendant city is not liable for the refusal, failure or neglect of its officers to perform their duties, and that these ordinances offered did not have to do with the private corporate affairs of the city of Louisiana; that they have to do solely with the governmental affairs of the city and that it is improper to admit such ordinance in evidence in the case, it being claimed that they are police regulations for the safety

and welfare of the public in general and have to do with the State rather than the private corporate affairs of the city. Another ordinance, apparently offered and read in evidence by plaintiff, but not set out in the abstract, was objected to and excluded by the court, on the ground that it did not seem to throw any light on the issues in the case.

The petition in the case, averring the incorporation of the city of Louisiana as a municipal corporation, existing and organized under the laws of this State, and averring that as such it was the duty of the city to keep Fourth Street, one of the streets in the city, on which the accident happened, and the sidewalks pertaining thereto, which it is averred constituted a public highway of the city, in a reasonably safe condition for the public use, for cause of action avers that on September 4, 1914 (so says the petition, but the date appears to have been the 14th), the defendant, through its officers, agents, servants and employees, negligently, carelessly, wrongfully and unlawfully permitted an obstruction, to-wit, a shooting gallery to be placed on Fourth Street by some one to the plaintiff unknown, which obstruction, it is averred, was then and there not only an unlawful and wrongful, but a dangerous obstruction; that on the day stated, while plaintiff was walking along the sidewalk of Fourth Street and lawfully on that sidewalk and in the exercise of ordinary care "a bullet fired in said shooting gallery, so unlawfully, wrongfully and negligently, and carelessly allowed to be erected on said street, by the officers of said city, glanced and struck this plaintiff in the eye, causing him great suffering and pain, and the loss of the sight of his eye. That by reason of said wrongful, unlawful and negligent act on the part of said city through its officers, agents, employees and servants, in so permitting said obstruction to be placed and maintained on said street, plaintiff has been damaged in the sum of \$7500." For this and costs he prays judgment.

The amended answer of the defendant upon which the case was tried, after a general denial sets up cer-

tain ordinances of the city then in force. As these ordinances were not put in evidence, it is unnecessary to notice them. The answer avers that if any obstructions were placed in the streets of the city, it was done without the knowledge or authority of the city, in violation of its ordinances and that the placing of the alleged obstruction, if any, was an unlawful act on the part of the person or persons so placing the obstruction in the street by which defendant is not bound; that if plaintiff was injured by a bullet being fired which glanced and struck plaintiff in the eye, this shooting was done in violation of the ordinance of the city and was an unlawful act, done without permission of the city and defendant not bound by it. Contributory negligence of the plaintiff is also pleaded as well as assumption of risk and that by ordinary care he could have avoided the injury.

There was a reply to this.

There was a trial before the court and a jury, the evidence introduced by plaintiff being substantially as above stated. At the conclusion of its introduction defendant asked an instruction to the effect that plaintiff could not recover. This was refused, defendant excepting and introducing no evidence. The court gave three instructions asked by plaintiff and four at the instance of defendant, refusing eleven which defendant asked. In the view we take of this case it is unnecessary to set out any of these asked, given or refused, save the one in the nature of a demurrer, which we have noticed.

The jury returned a verdict in favor of plaintiff for \$4000, judgment following, from which, interposing a motion for new trial as well as one in arrest and excepting to the overruling of these, the defendant has duly appealed.

REYNOLDS, P. J. (after stating the facts as above).—There are four assignments of error.

The points argued are to the overruling of the objection of the defendant to the introduction of any evidence and to overruling the demurrer to the evi-

dence at the close of the case. Under this it is argued, first, that plaintiff bases his cause of action solely on the negligence of the defendant in permitting an unlawful obstruction, to-wit, a shooting gallery, to be placed on one of its streets; that he does not charge that the alleged permitting of the shooting gallery to be placed there, or that the shooting gallery itself, or the operation thereof caused the injury but alleges that a bullet fired in the shooting gallery caused the injury. Second, that the defendant city is not liable for failure to prevent a violation of the law nor for failure to enforce its ordinance. Third, that the plaintiff contributed directly to his injury by voluntarily placing himself in a dangerous position; that he was injured while a spectator in attendance at the shooting gallery to witness the shooting and enjoy the pleasure that the shooting afforded and was not a traveler upon the highway.

Defendant did not demur to the petition but objected, when the trial opened, to any evidence, on the ground that the petition failed to state any cause of action. This objection was properly overruled. The petition does aver that plaintiff was injured by an unlawful obstruction in the street and so far it was good. Whether the averment was sustained by the evidence, is another matter.

In the light of the testimony in the case we dismiss from consideration the claim that plaintiff was injured by reason of an obstruction in the street. The carnival, and as part of it, the shooting gallery, did not obstruct plaintiff in the use of the street. When he was injured, according to his own testimony, he had passed beyond the various booths and exhibits pertaining to that affair and was beyond and north of the shooting gallery or target stand. Even granting that the carnival being permitted to show on the public streets created an obstruction and was a nuisance, its allowance was a wrong common to the public and gave plaintiff no right of private action. [Nagel v. Lindell Ry. Co., 167 Mo. 89, 66 S. W. 1090.] Plaintiff was in-

jured, not by an obstruction, as such, but by the allowance by the city officers of the unlawful use of one of the features of the carnival, that is, allowing one of its adjuncts to be used for the firing off of guns loaded with bullets. If the presence of the carnival in the street was a nuisance, it was common to the public and plaintiff could only recover for damages specially sustained by him by reason of obstructing his use of the street.

Beyond all question, the cities and municipalities of our State are liable for injuries caused by obstructions. Our reports are full of cases of that kind, sustaining actions against the city, but in all those cases the liability is fixed upon the city not by reason of its violation or disregard of its police powers, or the doing of acts in connection with its police powers, but by reason of its failure and neglect to properly discharge its corporate duties apart from the duty it owed as a municipality. Such are all the cases cited by learned counsel for respondent, of which *Benton v. City of St. Louis*, 217 Mo. 689, 118 S. W. 418, and *Buttrou v. Bridell*, 228 Mo. 622, 129 S. W. 12, are types. Those cases and the like are not applicable here. The injury which plaintiff sustained was the result of a splinter from a bullet fired from a shooting gallery or target tent, allowed and suffered by the city authorities to be placed and operated in the streets of the city, and the crucial question in this case is whether the city, as a municipality, is liable for damages sustained by reason of allowing this shooting gallery, as we will call it, in the street.

We may premise our consideration of the discussion of the question here involved by saying that neither by general statute nor by the acts of incorporation under which the city of Louisiana is acting, nor by any valid contract, is there any liability thrown upon the city. Its liability, if existing, is referable entirely to its position as agents of the people of the community and of the State.

We find and are referred to no decision of the courts of our State that covers the same state of facts as here present, that is, an injury to a pedestrian by reason of the city allowing firearms to be used in its streets. That is the real point here.

It is said in 28 Cyc., p. 1289, sec. III. par. b;

"In applying the principle that where a municipality is acting in its governmental capacity it cannot be held civilly liable for any act or omission, it is held that there is no liability for a failure to pass ordinances, even though they would, if passed, preserve the public health or otherwise promote the public good, or for any omission to enforce such ordinances or to see that they are properly observed by its citizens or those who may be resident within the corporate limits, or for injury occurring while the operation of an ordinance is suspended under the action of the municipality. This doctrine has been applied to actions brought to recover damages from the municipality for injuries both to person and property based upon failure to enact or enforce ordinances with regard to the use of streets and sidewalks; to injuries resulting from the firing of explosives or setting off of fire works, even though the acts were permitted or participated in by the municipality through its officers; . . . "

In the same work, p. 1299, par. h, subsection 1, it is said:

"When, by the action of the state, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation *pro tanto* is charged with governmental functions in the public interest and for public purposes, and in the exercise of its powers and duties in respect of the enactment and enforcement of police regulations it is entitled to the same immunity as the sovereign granting the power unless such liability is expressly declared by the sovereign. The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity but in the interest of the public."

It is further said in the same work, p. 1356, par. II, sec. f:

“The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate, powers, and the authorities are well agreed that for a failure to exercise legislative, judicial, or executive powers of government, there is no liability. Hence, upon this principle, it has been held that a municipal corporation, in the absence of an express statutory declaration to the contrary, is not liable for an injury caused by the failure to pass or to enforce an ordinance prohibiting the firing of cannon or firearms in its streets; the explosion of fireworks; the running at large of cattle and swine; horse-racing; or the riding of bicycles upon the sidewalks.”

The text of these paragraphs is supported by a multitude of cases.

By that learned writer, Judge DILLON, it is said:

“Many of the powers exercised by municipalities fall within what is known as the police power of the State, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storage of dangerous articles, to establish and control markets, and the like. . . . Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled ‘Police Laws or Regulations.’” [1 Dillon, Municipal Corporations (5 Ed.), p. 553, sec. 301.]

In volume 4 of the same work it is said, p. 2840, sec. 1627:

“Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation *is not bound to secure a perfect execution of its by-laws,*

relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened."

In *Murtaugh v. City of St. Louis*, 44 Mo. 479, it being there stated that the question presented is of first impression and without precedent in our State, the question involved was whether the city was liable for the negligence and misfeasance of the hospital authorities and servants in the administration of a particular charity, the City Hospital, and the court held it was not, saying, "no provision of the city charter or of any ordinance is cited in support of the action." The court further says (l. c. 480): "There have been, however, various adjudications upon the general question of the liability of municipal corporations for the acts and omissions of their officers and servants. The general result of these adjudications seems to be this: where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer, or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omission complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation, is not liable for the consequences of such acts or omissions upon the part of its officers and servants." Many authorities from the courts of other States are cited in support of this.

In *Armstrong v. City of Brunswick*, 79 Mo. 319, the petition in the case, setting up the non-performance of the duty of the city to keep it clear of noxious, offensive and unwholesome vapors and other nuisances, to the damage of plaintiff, who was the proprietor of a hotel, and setting up the charter provision of the city,

which gave it power to make regulations to secure the general health of the inhabitants and to abate, prevent and remove nuisances, charged that by the maintenance of a hog pen, plaintiff was injured in his business in the conduct of his hotel. A demurrer to the petition was sustained and plaintiff brought error to the Supreme Court. Reciting these provisions about the powers of the city, it is said that these powers given were conferred upon the corporation for the public good and not for private corporate advantage. *Murtaugh v. City of St. Louis*, *supra*, is referred to and quoted approvingly as settling the non-liability of the city.

In *Worley v. Inhabitants of the Town of Columbia*, 88 Mo. 106, damages were sought for the arrest and false imprisonment of plaintiff by the officers of the town. A demurrer was interposed to this petition and sustained. Setting out the act incorporating the town and the ordinance requiring auctioneers to take out a license, for failure to do which plaintiff was arrested and imprisoned, it is said (l. c. 111): "The substantial and broad question thus presented, is whether such municipal corporation is liable for a trespass, committed by its officers, in the execution or enforcement of a void ordinance." (It was claimed that this ordinance was void.) "It is the rule in this State in this class of cases, that the corporation is liable for the act of its agents, injurious to others, when the act is in its nature lawful and authorized, but done in an unlawful manner or unauthorized place, but is not liable for injurious and tortious acts, which are in their nature unlawful or prohibited," citing several cases from our State.

In *Ulrich v. City of St. Louis*, 112 Mo. 138, 20 S. W. 446, it is held that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation or its officers for the public good. A number of cases from our State are cited in support of this. [See, also, *Jefferson County v.*

St. Louis County, 113 Mo. 619, 21 S. W. 217; Connor v. City of Nevada, 188 Mo. 148, l. c. 152-153, 86 S. W. 256, and Cassidy v. City of St. Joseph, 247 Mo. 197 l. c. 205 et seq., 152 S. W. 306.]

In *Evans v. Holman*, 202 Mo. 284, 100 S. W. 624, the Supreme Court follows and approves an opinion of our court in the case of *McVey v. Barker*, 92 Mo. App. 489.

We have not overlooked the case of *Fuchs v. City of St. Louis*, as reported in 113 Mo. 168, 31 S. W. 115, 34 S. W. 508, when it was first before our Supreme Court, and when again there and reported under the same title in 167 Mo. 620, 67 S. W. 610. We find nothing in them here pertinent.

Our own court in *Wilks v. City of Caruthersville*, 162 Mo. App. 492, 142 S. W. 800, a case which involved the responsibility of the city for an injury to a horse which had been taken up by a city officer as a stray in the streets of the city, as it was claimed, contrary to the ordinance, it is held that in taking up the stray and tying it to a fence, from which it broke loose, carrying away with it a board and in running tripped over the board and was killed, that the city was not liable. Referring to the case of *Barree v. City of Cape Girardeau*, 197 Mo. 382, 95 S. W. 330, where the plaintiff was injured through the wilfull assault of the street commissioner while exercising the functions of his office, and in which the city was held liable, our court dwelt on the fact that the injury was so inflicted, and the defendant city liable to respond in damages for the reason that the injury resulted from the exercise of a franchise or power of the city conferred as a private advantage. "But though such be the rule in these cases," said our court in the *Wilks Case*, supra, (l. c. 498), "it is not so where it appears the injury results from the exercise of a power conferred upon the municipality exclusively for the public good. Such, for instance, is that to maintain a city workhouse or hospital, or that to abate, prevent and remove nuisances, or that to establish a fire department, or those relat-

ing to the public peace and good order or the suppression of vice and immorality or preserving the public health, caring for the poor or providing for education, or those relating to the general welfare, coupled with judicial or legislative discretion touching the manner or mode of their exercise and the like. Touching these powers, and to the extent that cities exercise them, their duties are regarded as due to the public and not to individuals. Indeed, as to these it is said the city's agents and officers are not the agents and officers of the corporation but of the greater public, the State at large. . . . In other words, no liability may be enforced against the city for the negligent conduct of its servants or agents in exercising a franchise which finds its origin in the powers of the character last enumerated."

Most of the cases from our courts which we have cited above are referred to in support of this, as also many authorities from other States. That case is in line with the case at bar and we think that the principle there announced is entirely applicable here.

When we turn to the decisions of courts of other jurisdictions, we find them announcing the same rule; that is, non-liability of the municipality for the acts of its officers acting for the public generally and not in the line of corporate duty.

Thus in *Ball v. Town of Woodbine*, 61 Iowa, 83, the plaintiff was in the town and injured by a skyrocket there set off during an exhibition of fireworks. It was charged that the fireworks were a dangerous public nuisance at the time they were placed and set off in the streets and squares of the city and were permitted by the town to be used and fired off to the great danger of persons who had occasion to be upon the streets and highways. A demurrer to the petition was sustained and plaintiff appealed. The Supreme Court of Iowa held that the demurrer was properly sustained, first, on the ground that the petition did not state facts showing a joint liability against the town of Woodbine and the other defendants, the other defendants being the

persons in charge of the fireworks; second, that the alleged acts of the officers of the town, or the town itself, in aiding and assisting in exploding the fireworks, were beyond the jurisdiction of the officers of the town in the exercise of their duties as town officers. The court held that the facts showed no more than a violation of the ordinance of the town in which violation the officers of the town were active participants and, said the court (l. c. 84): "It is well settled that cities and towns are liable for damages occasioned by obstructions negligently allowed to remain in the public streets of the corporation, and the like, and the authorities cited by counsel for appellant are actions for injuries of this character. These cases are founded upon the principle that the city, in the exercise of its municipal authority over public places, is guilty of negligence in the discharge of a duty within the scope of its powers. It is argued that the fireworks which caused the injury in this case were a dangerous public nuisance, which the officers of the city actively participated in maintaining. It can make no difference who were the individuals who violated the city ordinance. A city is no more liable for the consequences of a violation of an ordinance by its mayor or council as individuals, than it would be if the illegal act were done by a private citizen." The court cites *Morrison v. Lawrence*, 98 Mass. 219, as holding that the city was not liable to a person who was wounded by a rocket which was purchased by a committee of the city council, and negligently fired under their direction in celebrating the fourth of July.

To the same effect see *Borough of Norristown v. Fitzpatrick*, 94 Pa. St. 121, which was an action brought against the borough to recover damages for injury to plaintiff by reason of a cannon having been fired off in the public street during an authorized celebration. In that case it was held that even admitting that the assembly in the streets was a nuisance, and that of the worst kind, and although a policeman was stand-

ing by and made no effort to stop the firing, that the borough was not liable; that cities, etc., have been held responsible for neglect in the maintenance of highways, etc., because they belong to their immediate jurisdiction and over them they alone have jurisdiction, but the conservation of the peace is a public duty, put by the commonwealth into the hands of various public officers, and that the fact that the police officers and other officers of the city, whose duties are of a public nature and whose appointment devolves on the city by the State as a convenient mode of exercising a public function, violate or neglect their duties, does not render the municipality liable for their unlawful or negligent acts.

In *Dudley v. City of Flemingsburg*, 115 Ky. 5, 72 S. W. 327, it is held that a municipal corporation, in the preservation of peace, maintenance of good order, and enforcement of the laws for the safety of the public, possesses governmental functions and therefore is not liable for injuries sustained by one who is run into by a coasting sled on the street. In that case the Court of Appeals of Kentucky cites and quotes approvingly from *Jolly's Admx. v. City of Hawesville*, 89 Ky. 281, 12 S. W. 313, in which case a large number of persons, in the presence of and with the consent of the city officials, with guns and pistols, had assembled and engaged in a sham battle, pursuing and shooting at each other in such close proximity as to endanger the lives of those who were not, as well as those who were, engaged. Quoting from *Prather v. City of Lexington*, 13 B. Mon. 563, in the *Dudley Case* (l. c. 11), it is said that the court proceeded upon the theory that the "officers of a city are *quasi* civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation responsible." Quoting further from *Jolly's Admx. v. City of Hawesville*, *supra*, the Court of Appeals in the *Dudley Case* says (l. c. 12): "Such has been the uniform ruling of this court, and a different one would be not only perverse of the main design of creating municipal cor-

porations, intended principally as auxiliary of the State government, but open the door for actions against cities on account of every personal injury in any degree attributable to misfeasance or nonfeasance of police officers, and thus impose burdens on taxpayers in no just sense at fault or liable."

In a very full examination of the authorities, the Supreme Court of Wisconsin arrived at the same conclusion in *Schultz v. The City of Milwaukee*, 49 Wis. 254.

In *Lincoln v. City of Boston*, 148 Mass. 578, it was held that the city was not liable for injuries occasioned to a person by reason of his horse becoming frightened, while being driven along an adjoining street, by a cannon being fired on the Common under a license granted in pursuance of a city ordinance.

In *Arms v. City of Knoxville*, 32 Ill. App. 604, it is held that the negligence of the police or police officers in failing to stop the firing of a cannon known to be dangerous upon the streets of a city, does not render the city liable to the administratrix of the person killed as a result of such negligence. The cases are very fully considered in this opinion, not only from the State of Illinois but throughout the country. The court in coming to the conclusion of the case (l. c. 610) says: "A municipal corporation is not liable for the nonfeasance or misfeasance of the officers of its police. . . . For failure to exercise governmental power cities are not liable." Among other authorities quoted and followed in that case is that of *Ball v. Town of Woodbine*, supra.

Our conclusion in this case is that the city authorities, or those of them who did permit the location of this street fair, and as a part of it the setting up and operation of this shooting gallery, had no authority under the charter of the city, or the laws of the State, to grant such permission, and the city officers and the city police failed in their duty in not abating, at least this dangerous part of that exhibition. But the city of Louisiana, as a municipal corporation of the State, and exercising its public functions, is not liable for

the damages which resulted from the nonfeasance or malfeasance of its officers.

In this view of the case it is unnecessary to consider other questions suggested, as, for instance, the question of the contributory negligence of the plaintiff and the admission and exclusion of evidence and instructions given or refused, save as to the one asked by appellant, at the close of all the evidence in the case, that the plaintiff could not recover on the law and on the facts. That should have been given.

The judgment of the circuit court is reversed. *Allen* and *Becker, JJ.*, concur.

TRUSTEES OF LaGRANGE MALE AND FEMALE
COLLEGE AT LaGRANGE, Appellants, v. JUD-
SON E. PARKER, Admr. of the Estate of H. C.
PARKER, Deceased, Respondent.

St. Louis Court of Appeals. Submitted on Briefs, January 7, 1918.
Opinion Filed February 5, 1918.

1. **BILLS AND NOTES:** Subscription to Endowment Fund: Consideration: Evidence. In a proceeding on a note payable out of the maker's estate twelve months after his death, and reciting that it was a subscription to the endowment fund of a college, evidence held to show that there was no consideration for the note.
2. ———: ———: ———. A note given as a subscription to the endowment fund of a college was a mere promise of a gift and unenforceable, where no consideration was given for the note, either by expending money or incurring enforceable liabilities in reliance thereon, or in any other way, especially where it was payable out of the maker's estate after his death.
3. **GIFTS:** Requisites: Consideration. No consideration is necessary to support a gift *inter vivos*.

Appeal from the Circuit Court of Lewis County.—*Hon.*
Chas. D. Stewart, Judge.

AFFIRMED.

H. H. Howard, Hilbert & Henderson and A. F. Haney, for appellant.

(1) The note sued on in the case at bar is not an attempt to make a testamentary disposition of property, but is a non-negotiable promissory note, importing a consideration on its face. The fact that this note, by its terms, is made payable out of the maker's estate, twelve months after his death, does not constitute it an attempted testamentary disposition of money. *Maze v. Baird*, 89 Mo. App. 348. (2) The note sued on in the case at bar upon its face imports a consideration and if the defendant desired to rely upon the defense of want of consideration it was incumbent upon him to plead and prove a want of consideration. *R. S. 1909, sec. 2774; Trustees of Christian University v. Hoffman*, 95 Mo. App. 488-495; *Maze v. Baird*, 89 Mo. App. 348, 353; *Houck v. Frisbee*, 66 Mo. App. 16, 21; *Hoffman v. Trust Co.*, 68 Mo. App. 177, 181; *Feurt v. Ambrose*, 34 Mo. App. 360, 367; *Wulze v. Schaefer*, 37 Mo. App. 551. (3) A note given as a donation to the endowment fund of the college imports a consideration just as truly as any other note or written promise to pay money, notwithstanding it is a note given as a donation to said fund. *Trustees of Christian University v. Hoffman*, 95 Mo. App. 488. So these notes import a consideration notwithstanding the fact that they are given as donations to an endowment fund. It is well recognized that the usual character of consideration ordinarily attaching to these notes are the expenses incurred, improvements made, professors hired, etc., in reliance upon these notes. *Trustees of Christian University v. Hoffman*, 95 Mo. App. 488; *Koch v. Lay*, 38 Mo. 147; *McClanahan v. Payne*, 86 Mo. App. 284, 290, 291; *School District v. Sheidley*, 138 Mo. 672, 684.

Carroll Bozarth, H. S. Rotse and E. R. McKee, for respondent.

(1) There is no evidence before the court that trustees accepted the charter. Acceptance was nec-

essary to make them a body corporate. Afterwards by an act approved January 16, 1860, (Laws of 1899 & 60, p. 131, abstract, p. 18), term of above-named trustees, by implication, was limited to time of annual meeting of Wyaconda Baptist Association in 1860, and it was therein provided, "At the annual meeting of the Wyaconda Association of Baptist Church in 1860 said Association shall divide the trustees of said college into three classes, and proceed to elect as follows: The first class for one year, the second class for two years, the third class for three years, and at each annual meeting of the Association thereafter three trustees shall be elected to serve for the term of three years." The evidence does not reveal the fact that such election was had, or that any election has ever been held under that act. Does not show any act was done at any time by any authorized party that could be construed into the acceptance of aforesaid charter, while acceptance was necessary to give it life. Acceptance is the breathing into a corporation the breath of life. It is dead until so brought to life. *Rialto Co. v. Miner*, 183 Mo. App. 119; *State v. Dawson*, 16 Ind. 40; *People v. Michigan Cent. R. Co.*, 145 Mich. 140. (2) The court of civil appeals of Texas in *Wasson v. Clarendon College and University Training School*, 131 S. W. 852, fully considered the word, and above and foregoing definitions were approved and adopted under the facts and conditions of that case. Under above and foregoing definitions, the note means the same as though it read "As a gift to LaGrange College I promise to pay." It being a gift, it was a promise that he, payor, would give the amount at the date of the maturity of the note, twelve months after his death. *School District v. Sheidley*, 138 Mo. 672; *Pennell v. Ennis*, 126 Mo. App. 359. (3) Being a donation, a gift to take effect in the future, it was absolutely void. *Harris Banking Co. v. Miller*, 190 Mo. 640; *In re Estate of Soulard*, 141 Mo. 642.

REYNOLDS, P. J.—Plaintiff, appellant here, exhibited to the probate court of Lewis county a note for allowance against the estate of one H. C. Parker, deceased, that estate then being in the course of administration and in charge of Judson Parker, Administrator. The note exhibited is as follows:

“ENDOWMENT NOTE.

\$1,000

Ewing, Missouri, June 7, 1912.

For value received and as a subscription to the Endowment Fund of LaGrange College located at LaGrange, Mo., I promise to pay to the Trustees of said
LAGRANGE COLLEGE

the sum of One Thousand Dollars.

Said sum to be paid out of my estate twelve months after my death, with interest from date at the rate of one per cent. per annum.

Without relief from valuation or appraisement laws and to be used as part of the endowment fund of said institution, the interest only to be used for current expenses.

Attest: J. D. SCOTT.

(Signed) H. C. PARKER.”

The claim was originally presented in the name of “Trustees of LaGrange College of LaGrange, Missouri, a corporation.” From a judgment of the probate court disallowing the claim, the trustees of the college appealed to the circuit court. There they were allowed to amend the claim and the proceedings in the probate court, then in the circuit court, by substituting the name “Trustees of LaGrange Male and Female College,” substituting that name for “Trustees of LaGrange College,” where that name appeared.

The only pleading on the part of the defendant administrator is an affidavit by him denying the corporate capacity of the plaintiff and denying that the claimants are the trustees properly elected or appointed. The case was tried in the circuit court on the appeal without any pleading other than the above on the part of the defendant but evidently tried on the ground of *nul tiel* corporation and of want of any consideration for the note.

At the trial in the circuit court, the amendment having been made in the title above stated, plaintiffs introduced the note in evidence, it being admitted that it bore the signature of H. C. Parker. They also introduced the Session Acts of 1858, p. 52, providing for the incorporation of LaGrange College under the name of LaGrange Male and Female College of LaGrange, and an amendment to the Act of incorporation, approved January 16, 1860 (see Laws 1859-60, p. 131), the amendment consisting of dividing the Board of Trustees of the college into three classes. It was in evidence and undisputed that while the corporate name was LaGrange Male and Female College of Lewis County, or at LaGrange, that the institution was commonly known as LaGrange College.

Plaintiffs then undertook to prove consideration for the note. The evidence tended to show that one J. D. Scott, who had signed as a witness to the note, had been getting up subscriptions to the endowment fund of the college and that he had delivered this note to the board of trustees of the college. When that delivery was made, does not appear. Under cross-examination of plaintiffs' witnesses the question of consideration was entered into and of this it may be said, without repeating it, that the treasurer of the corporation testified that he did not remember any consideration ever having passed for the note; that his records and his recollection did not show that Parker, the maker of the note, had ever paid anything on account of it. Asked if the note was evidence of a donation made by the deceased to the college, the most that the treasurer was willing to say was that the note had been brought to him by Mr. Scott, who was authorized to obtain money for the college and to receive donations for the college. But this witness, who had been treasurer during the whole time, asked if the college had ever paid Parker anything in consideration for the note, said, "Not in my remembrance." Asked if he had any record of paying him anything, he answered, "Not that I know of," and asked if he remembered that he, as treasurer, had ever paid any

money to Parker for the college, he answered that he did not think he did, and admitted that in his deposition, which had been taken in the case, he was asked if the note was a donation, to which he answered that it was, and that as he remembered, it was a donation to some fund.

With this testimony and what may be called negative testimony of a professor, possibly, now, certainly at one time president of the college, to the effect that he knew nothing at all about the transaction, plaintiffs rested, defendant introducing no testimony.

The cause was tried before the court without a jury and at the instance of the plaintiffs the court gave three declarations of law. The first was to the effect that the note in question upon its face imports a consideration therefor and that the burden of proof was upon the defendant to show that the note is without any consideration and that unless it is proven by evidence introduced in the case that the note is without consideration, the finding of the court must be that there was a consideration for the note.

The court refused the second declaration asked by plaintiffs, which was to the effect that the evidence in the case failed to prove that the note in controversy is without consideration, and the finding of the court is therefore that the note is supported by a consideration.

There was a finding and judgment for defendant, from which plaintiffs have duly appealed.

We find no serious objection to any of the declarations given nor to the action of the court in refusing the second asked.

While the defendant introduced no evidence, it may be said that the evidence elicited from the plaintiffs' own witnesses fails to show any consideration for the note.

In a case of this kind the substantial and most important controversy is whether, under the evidence, any consideration for the note sued upon is shown, and it may be said that plaintiffs' own evidence, developed on cross-examination and in no way contradicted in the

direct testimony, made it clear that the maker of the note received no benefit for his promise which can be regarded as a sufficient consideration to support it. That, says our Supreme Court in *School District of Kansas City v. Sheidley*, 138 Mo. 672, l. c. 683, 40 S. W. 656, is the really important point to be settled; that is, whether under the evidence any consideration for the note sued upon was shown. The case therefore stands before us as a gift to take effect on the death of the maker of the note, payable after his decease out of his estate and is non-enforceable. No consideration is necessary to support a gift *inter vivos* [12 R. C. L., p. 932, sec. 10.]

"The delivery of an unsealed written declaration of a gift without a delivery of the property; like a parol declaration of a gift, stands upon the footing of a mere promise to give and is void at law. . . . It is well settled as a broad general rule that a promissory note executed without consideration and intended merely as a gift *inter vivos* to the donee, cannot be made the basis of a recovery either at law or in equity by the donee against the donor or against his estate after his death. This is upon the ground that such a note is a mere promise, and that the gift of the note is the delivery of a promise only and not the thing promised, and a note without consideration, payable out of the estate of the maker after his death, is void." [12 R. C. L., pp. 937 and 940, secs. 14 and 17.] In *School District v. Sheidley*, supra (l. c. 683) it is further said: "That the note of a donor to a donee is not the subject of a gift is well settled law. Such a note is but the promise of the donor to pay money in the future. The gift is not completed until the money is paid. There is no delivery of the gift, but a mere promise to deliver in the future. Such a note, treated purely as a gratuitous promise, cannot be enforced either in law or equity." It is further said in the above case (l. c. 684): "The question then is, can these notes be enforced as valid contracts, notwithstanding *Sheidley* received no benefit therefrom, and intended them as purely gratuitous donations? If so there must

have been a legal consideration moving from the district to him. To constitute such consideration it is not essential that Sheidley should have derived some benefit from the promise. The consideration will be sufficient to support the promise, if the district expended money and incurred enforceable liabilities in reliance thereon. If the expense was incurred and the liability created in furtherance of the enterprise the donor intended to promote, and in reliance upon the promises, they will be taken to have been incurred and created at his instance and request, and his executors will be estopped to plead want of consideration. The gratuitous promises will thus be converted into valid and enforceable contracts." Many authorities are cited in support of this proposition.

In the case at bar there is no evidence whatever that this institution expended any money or incurred any enforceable liabilities in reliance upon the note, nor of any of the other factors held sufficient to afford a consideration.

In *Harris Banking Co. v. Miller et al.*, 190 Mo. 640, 89 S. W. 629, the matter of gifts is very learnedly discussed, in connection, however, with the question of a trust, and it was there held that the words there used were a sufficient declaration of a trust, the court holding that it does not follow because a party cannot establish a perfect gift *inter vivos*, he may not show a valid executed express trust in his favor and have it enforced. We have no such case here.

In *Methodist Orphans' Home Ass'n v. Sharp's Exec.*, 6 Mo. App. 150, it is held that gratuitous subscriptions for charitable purposes cannot be enforced unless the promisee has, in reliance on the promise, done something; that there being no consideration to support the promise, it cannot be enforced.

In *Maze v. Baird*, 89 Mo. App. 348, recovery was had on a note because the evidence showed a consideration for the giving of it, the note there being payable after the death of the maker and out of his estate. Our court passing on that case went into a careful examination of

Trustees of LaGrange College v. Parker.

the evidence, holding that it did show a consideration moving between the parties for the giving of the note, and we there held that under the evidence there was a mere postponement of payment, evidenced by the note.

The same subject is discussed by Judge BARCLAY, then of our court, in *Trustees of Christian University v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474. That was a note payable to the institution on account of its permanent endowment fund and on certain conditions. That learned judge discussing the evidence and the matter under consideration, held that it is the settled law of this State that where a promise, evidenced by a note, "has been made to an institution like that of the plaintiffs, and, before the promise is withdrawn, obligations have been created or expenses incurred by the promisee upon the faith of the promise, these facts furnish a consideration to support the original agreement, although, in the first instance, it may have partaken somewhat of the nature of a gift." Among other authorities cited in support of this is *School District v. Sheidley*, supra. See also *Pennell v. Ennis*, 126 Mo. App. 355, 103 S. W. 147, where it is held that a check drawn on the drawer's general account in bank will not constitute a gift to the payee of the amount of the check, if it is neither accepted nor paid prior to the death of the drawer. This, our court said, is true whether the transaction is regarded as *inter vivos* or *causa mortis*, a complete delivery being essential to a valid gift. The authorities are fully discussed by Judge Goode in his opinion in that case. There Judge Goode distinguishes *Harris Banking Company v. Miller*, supra, and like cases involving trusts, from the case then before the court. See also *Citizens National Bank v. McKenna*, 168 Mo. App. 254, 153 S. W. 521, where the question was before the Kansas City Court of Appeals, arising over a certificate of deposit, and that court held that in order that there may be a valid gift of personal property, in addition to an intention to give, there must be an actual delivery. There also *Harris Banking Co. v. Miller*, supra, is distinguished.

Hauck v. Hauck.

In brief all the authorities to which our attention has been called, or which we have found, are one way: namely, that there must appear a consideration back of a note, to make it otherwise than a mere gift, especially so, when by its very terms it is to be paid out of the estate of the maker, as here.

Our conclusion is that the trial court committed no error in refusing the declaration of law asked and in finding for the defendant, administrator, and refusing to allow the note as a demand against the estate of the decedent.

The judgment of the circuit court is affirmed. *Allen* and *Becker, JJ.*, concur.

HATTIE HAUCK, Appellant, v. JULIUS HAUCK,
Respondent.

St. Louis Court of Appeals. Argued and Submitted January 7, 1918.
Opinion Filed February 5, 1918.

1. **JUDGMENTS: Revival: Divorce: Alimony and Maintenance: Modification: Security.** Rev. St. 1909, section 2375, provides that where a divorce shall be adjudged, the court shall make such order touching alimony and maintenance of the wife and the children as shall be reasonable, and, when the wife is plaintiff, may order defendant to give security for such alimony and maintenance, and that on neglect to give such security the court may award execution, and that on the application of either party the court may make such alteration from time to time as to alimony and maintenance as may be proper. *Held*, that where a judgment granting alimony and an allowance for the maintenance of a minor child made no provision for security, and the wife, after issuing an execution which was returned unsatisfied, and instituting a proceeding by garnishment, which ended without anything being collected, took no further action for over ten years, and did not have the judgment revived from time to time, the judgment was dead, and the court could not thereafter require such security.
2. ———: ———: ———: ———: **Limitation.** A judgment for permanent alimony in a divorce case is subject to the same incidents as judgments in other actions at law, and when not revived, no execution can be issued upon it after the expiration of ten years from its rendition.

Appeal from the Circuit Court of the City of St. Louis.
—*Hon. James E. Withrow*, Judge.

AFFIRMED.

Thos. H. Sprinkle for appellant.

(1) The judgment being for alimony gave the court a continuing jurisdiction and control over the parties and subject-matter of alimony and the court should have sustained plaintiff's motion to require security, which was omitted in the decree. *Schmidt v. Schmidt*, 26 Mo. 236; *Burnside v. Wand*, 77 Mo. App. 390; *Francis v. Francis*, 192 Mo. App. 710; Sec. 2375, R. S. 1909; *Coughlin v. Ehlert*, 39 Mo. 286; *Cole v. Cole*, 89 Mo. App. 228. (2) All that portion of the decree which relates to the subject of alimony is subject to the future control of the court. *Dreyer v. Dickman*, 131 Mo. 660; *Schmidt v. Schmidt*, 26 Mo. 236. (3) The judgment establishes the fact of the ability of the defendant to pay and the burden is on defendant to show his poverty. 14 Cyc., p. 801, N. 56; *Staples v. Staples*, 24 L. R. A. 435; 437; *Hurd v. Hurd*, 63 Minn. 443, 446; *Wright v. Wright*, 74 Wis. 443; 2 *Bishop on Marriage, Divorce and Separation*, secs. 892, 893; *Lester v. Lester*, 63 Ga. 356; *Holtman v. Holtman*, 6 Misc. (N. Y.) 266; *Ryer v. Ryer*, 67 How. Pr. 369.

Buder & Buder and *Eugene Buder* for respondent.

(1) Allegations of fact in a motion are no proof thereof. The burden of proof upon the hearing of a motion rests with the moving party. *State v. Craft*, 164 Mo. 631, 649-50; 28 Cyc. 15, note 24; *Shearman v. Hart*, 14 Abb. Pr. (N. Y.) 358; *Staples v. Staples*, 24 L. R. A. 435, note 4. (2) A suit for divorce and alimony is an action at law. *Chapman v. Chapman*, 269 Mo. 663; *Dreyer v. Dickman*, 131 Mo. App. 660. (3) The ten-year Statute of Limitations applies to judgments for alimony as in case of other judgments. Relief is not given to those who sleep on their rights. Sec. 1912,

R. S. 1909; Dreyer v. Dickman, 131 Mo. App. 660; Bispham, Principles of Equity (6 Ed.), secs. 38 and 39; Davidson v. Mayhew, 169 Mo. 258; Thompson v. Lindsay, 242 Mo. 53; Burrus v. Cook, 215 Mo. 496. (4) Under Sec. 2375, R. S. 1909, it is discretionary with the court whether or not it will alter a judgment for alimony, at a subsequent term of court. Francis v. Francis, 192 Mo. App. 710, 728-9.

REYNOLDS, P. J.—It appears that by judgment of date July 1, 1903, in an action for divorce, in which appellant here was plaintiff, and respondent defendant, appellant was divorced from respondent, awarded the custody of their minor son, then, as we gather, about seven years of age, and allowed \$15 a month, payable monthly, for the maintenance of the boy. It also appears that an execution was issued on that judgment and a *nulla bona* return made on it by the sheriff on October 2, 1903, and a proceeding by garnishment sued out, to which the garnishee made answer December 14, 1903, denying any indebtedness, and no denial being interposed, that proceeding ended. This appears to have been the last step taken in the case until on February 26, 1915, the appellant (plaintiff in the divorce action) filed in the circuit court of the city of St. Louis a motion entitled in the cause, asking the court to require defendant therein—now respondent—“to give security, ample and sufficient, for the payment to her of the alimony adjudged to her in said cause, at the rate of \$15 per month, payable on the first day of July, 1903, and a like sum payable to her on the first day of each month thereafter, for the maintenance of their minor male child, the care, custody and control of which said child, was therein adjudged to plaintiff.” The motion further avers that no part of the above “alimony” has been paid, although payment has been demanded, and sets out the issue of an execution and its delivery to the sheriff of the city of St. Louis, the sheriff’s return to the same unsatisfied and the garnishment proceeding all as before mentioned. The motion

coming on for hearing before the court, plaintiff introduced the judgment, execution, return and proceedings in garnishment. She also testified that she had supported the child; had received nothing from defendant; had no means of her own; that her former husband is a doctor and had married again in September or October, 1904, and that the son now, in 1915, then apparently about 19 years of age, earned \$37 a month. Other of plaintiff's witnesses testified that defendant claimed to be in good practice and plaintiff's mother testified that she had contributed to the support of plaintiff. A letter from a brother of defendant, to plaintiff, offering to make a compromise if plaintiff would accept \$50 from him (the brother) and enter satisfaction of all claims against the defendant, was offered in evidence. The court excluded this, and at the conclusion of the hearing, denied the motion. From this plaintiff has appealed.

It is true that section 2375, Revised Statutes 1909, provides that where a divorce shall be adjudged the court shall make such order touching the alimony and maintenance of the wife and the custody and maintenance of the children as from the circumstances of the parties and the nature of the case shall be reasonable, "and when the wife is plaintiff, may order the defendant to give security for such alimony and maintenance." That same section further provides that upon neglect to give such security, the court may award execution, etc., and that the court, on the application of either party, may make "such alteration, from time to time as to the allowance of alimony and maintenance, as may be proper."

Section 2381, among other things provides that there may be a review of any order or judgment touching the alimony and maintenance of the wife and the care, custody and maintenance of the children.

In *Burnside v. Wand*, 77 Mo. App. 382, our court held that an order to give security for the payment of alimony and maintenance might be entered by the circuit court on a proper showing, after the entry of the original judgment granting a divorce and allowing ali-

mony, but which judgment did not require security for payment of alimony or maintenance. While it is not necessary now to pass on the correctness of that holding, under its facts then present that decision has no application to the crucial point in the case at bar, the order to give security for the payment of the alimony having been there entered within a year after the original order granting the decree of divorce. Whether the security required in that case covered past due payments, that is payments that had accrued between the rendition of the decree and the filing and sustaining of the motion for security, does not appear. At any rate, there is no question but that the judgment decreeing alimony and maintenance and making a monthly allowance then before our court, was a live judgment at the time the order to give security was entered. In the case at bar, however, the application for the order to give security was made about eleven years and seven months after the rendition of the decree of divorce and allowance for the support and maintenance of the child.

Our court, on full consideration, held in *Dreyer v. Dickman*, 131 Mo. App. 660, 111 S. W. 616, that a judgment for permanent alimony to be paid in continuous monthly installments was subject to the same incidents as any other judgment, and that an execution could not be issued upon it after the expiration of ten years from its rendition, the original judgment not requiring defendant to give security for the alimony nor providing any other method for its collection except the issuance of an execution. We accepted that as a correct ruling in *Francis v. Francis*, 192 Mo. App. 710, l. c. 719, 179 S. W. 975, and are not aware of any decision by any of our courts in which it has been challenged.

In *Biffle v. Pullam*, 114 Mo. 50, 21 S. W. 450, our Supreme Court held that judgments for alimony in divorce proceedings were subject to the same incidents as judgments in other actions at law, and an

action for divorce is an action at law. [Chapman v. Chapman, 269 Mo. 663, 192 S. W. 448.]

Applying these principles to the case at bar, it follows that when the motion was made here, to compel the defendant in the divorce action to give security for the payment of the amount allowed for the maintenance of the son, the judgment was dead, more than ten years having expired from the date of its rendition. No execution could now be issued on it and it follows that no order could now be made requiring security for its payment for such an order can only apply to a live judgment.

It is further to be said that in the case before us there is no showing whatever of the ability of defendant here to give the security. Furthermore, after having an execution issued on this judgment in 1903, the year in which the judgment was rendered, plaintiff took no steps whatever towards its enforcement. Nor did she have it revived from time to time, as she could have done, and so preserved it alive as a judgment, as see *Dreyer v. Dickman*, supra.

It follows that the action of the trial court in overruling the motion in this case was correct and is affirmed. *Allen and Becker, JJ.*, concur.

JESSIE McKINNEY, Respondent, v. MARTIN-HOLLORAN-KLAUS LAUNDRY COMPANY, a Corporation, Appellant.

St. Louis Court of Appeals. Opinion Filed January 8, 1918.

1. **TRIAL PRACTICE: Contributory Negligence: Necessity of Pleading.** Even though no plea of contributory negligence is set up by the defendant, yet whenever it is shown by plaintiff's own proof that there was contributory negligence such as to preclude a recovery, the trial court should take the case from the jury upon a demurrer to the evidence.

McKinney v. Laundry Co.

2. **MASTER AND SERVANT: Injuries to Servant: Contributory Negligence: Evidence.** In an action for personal injuries by a laundry employee whose hand was hurt in an ironing machine, and there was a conflict in plaintiff's evidence as to whether the machine could have been operated in two ways, one of which would have been safe, and the other unsafe, *held* that plaintiff was not guilty of contributory negligence as a matter of law, and that the trial court properly submitted the question to the jury.
3. ———: ———: **Defective Appliances: Instructions: Sufficiency.** In an action by a laundry employee for injuries received while operating an ironing machine, the court at her request instructed that, though plaintiff knew, or by the exercise of ordinary care could have known, that the machine was out of order and dangerous at the time she was injured, such knowledge did not defeat her right of recovery if she was negligently furnished and ordered by the defendant's foreman to operate such machine, unless the danger was so glaring as to threaten immediate injury, and that an ordinarily prudent person in plaintiff's position would have refused to work at the machine. *Held*, that the instruction did not purport to cover the whole case, and direct a verdict, and while the instruction was subject to criticism, its defects were cured by plaintiff's previous instruction, which correctly and fully covered the entire case, and predicated a finding on all the essential facts necessary for the jury to find before they could return a verdict in favor of plaintiff.
4. **TRIAL PRACTICE: Instructions: Sufficiency.** Where a series of instructions taken together contained a complete exposition of the law, and covered every phase of the case, a verdict obtained thereon must be sustained, though the instructions taken separately are incomplete.
5. ———: **Appellate Practice: Improper Argument of Counsel: Sustaining Objection.** Where the court sustained an objection to improper argument by plaintiff's counsel, and defendant's counsel did not move to discharge the jury and declare mistrial, or to rebuke plaintiff's counsel, error on appeal cannot be predicated thereon.

Appeal from the Circuit Court of the City of St Louis.
—Hon. J. Hugo Grimm, Judge.

AFFIRMED.

McGrath & Houlihan and *Taylor & Chasnoff* for appellant.

(1) The court erred in refusing to give the instructions in the nature of a demurrer to the evidence,

offered by appellant at the close of respondent's evidence and at the close of the whole case. From the testimony of respondent it conclusively appears that the machine in question could have been operated in two ways, one safe and one unsafe. Respondent chose to operate it in the unsafe way. This constituted contributory negligence, and she was not entitled to recover. Even granting that the manner of operation adopted by respondent was the only one available, it was so obviously dangerous that its adoption by respondent constituted contributory negligence, and she was not entitled to recover. *Sissel v. Railroad*, 214 Mo. 515; *Moore v. Railway*, 146 Mo. 572; *Hurst v. Railroad*, 163 Mo. 309; *Montgomery v. Railroad*, 109 Mo. App. 88; *Smith v. Box Company*, 193 Mo. 715; *Pohlmann v. American Foundry Co.*, 123 Mo. App. 219; *Slagel v Lumber Company*, 138 Mo. App. 432; *Hirsch v. Bread Company*, 150 Mo. App. 162; *Harris v. Railroad*, 146 Mo. App. 524; affirmed, 250 Mo. 567; *Schiller v. Breweries Company*, 156 Mo. App. 569; *Rogers v. Packing Company*, 185 Mo. App. 99. (2) The trial court erred in giving instruction 2 offered by respondent and modified by the court. This instruction authorized a recovery for respondent, on proof of general negligence when specific negligence was pleaded, it assumed the existence of controverted matter, and although purporting to cover the entire case, ignored and excluded elements necessary to respondent's recovery. Cases cited under point 1, *supra*, *Cathart v. Railway Co.*, 19 Mo. App. 113; *Flynn v. Bridge Co.*, 42 Mo. App. 529; *Freeman v. Railway Co.*, 95 Mo. App. 94; *Baker v. Independence*, 106 Mo. App. 507; *Wilks v. Railroad*, 159 Mo. App. 711; *Bryan v. Lamp Co.*, 176 Mo. App. 716; *Dority v. Railroad*, 188 Mo. App. 365; *Walker v. White*, 192 Mo. App. 13. (3) The conduct of counsel for respondent in arguing to the jury the matter of respondent's poverty was so prejudicial to appellant that its effects were not eradicated by the action of the trial court. It is the function of an appellate court, under such circumstances, to

set aside a judgment so obtained and to award a new trial. Bishop v. Hunt, 24 Mo. App. 373; Killoren v. Dunn, 68 Mo. App. 212; Rice-Stix & Co. v. Sally, 176 Mo. 107; Beck v. Railroad, 129 Mo. App. 7; Barnes v. St. Joseph, 139 Mo. App. 545; Barr v. Railroad, 138 Mo. App. 471; Trent v. Printing Co., 141 Mo. App. 437; O'Donnell v. McElroy, 157 Mo. App. 547; Haake v. Milling Co., 168 Mo. App. 177.

Charles P. Comer for respondent.

BECKER, J.—This is an action for personal injuries to plaintiff, alleged to have been sustained by her while in the employ of the defendant company, and by reason of the defendant's negligence. From a judgment in favor of plaintiff and against defendant in the sum of \$1750, the defendant appeals.

Plaintiff alleges in her petition that she was in the employ of the defendant company and working upon and about an ironing machine, which was operated by mechanical power; that part of her duty was to iron clothing with said ironing machine and in order to do so it was necessary for her to arrange such clothing upon the machine with her hands, and that when the clothing was properly adjusted and ready for ironing, it was her duty to transmit mechanical power to said machine by pressing upon a treadle with her foot which caused same to operate and iron said clothing.

The petition further alleges that the said ironing machine, upon which plaintiff was required to work, was defective, and that while she was working upon it power was transmitted to said machine in some way unknown to plaintiff and without the application of foot pressure to the treadle thereof, which caused said machine to close upon plaintiff's left hand and to injure the same; that appellant knew, or by the exercise of ordinary care could have known of this defective condition but negligently furnished the respondent

with this machine as a result of which negligence plaintiff received the injuries complained of.

The defendant in its answer denied the allegations of the petition generally and pleaded the negligence of plaintiff either "(a), in carelessly placing her hand on the ironing board and in front of the iron while the same was in motion, and in carelessly permitting her hand to remain thereon until it was run upon and burned; or, (b) in placing her hand on the ironing board and in front of the iron while the same was not in operation and in carelessly applying the foot power, thereby causing the iron to run upon and burn her hand."

The plaintiff's reply was a general denial of the allegations in the answer.

Plaintiff testified that at the time she met with her injuries she had been working on the ironing machine in question about a month; that the machine consisted of an ironing board about two and one-half feet long by about eighteen inches wide, with an iron roller set at one end of, and slightly above the ironing board. This iron roller, when the machine was used, was kept at a high temperature; that when the machine is at rest one end of the ironing board is directly under the iron roller. The plaintiff testified that her method of working was to place the garment to be ironed upon the ironing board while the machine was at rest, then to transmit power to the machine by pressing a foot treadle which caused the iron roller to revolve and simultaneously therewith the ironing board, with the clothing to be ironed upon it, would raise up sufficiently to press the garment against the iron and the ironing board by the action of the machine would move backwards and away from the operator and under the iron to its full length. That whenever the pressure was removed from the foot treadle the ironing board would move out from under the iron back toward the operator and come to a rest; that the iron roller is stationary having only a revolving motion; that on the side of the machine there is a lever provided, by which the iron-

ing board can be dropped down and away from the iron about one inch.

Plaintiff further testified that at the time she received her injuries she was ironing a collar of a garment; that the usual way was to stretch it across the top of the ironing board directly under the iron, though the operator could place the collar of the garment across the center of the board or over the lower end of the board, neither of which portions of the board were under the iron when the machine was at rest. Plaintiff further testified that the machine had been out of order for about a month and that it had on a number of occasions, "closed up" of its own accord without her placing her foot upon the treadle and went through the same operation as though the machine had been started by pressing the treadle. Plaintiff further testified that as she was straightening the collar of the coat which she was ironing, on the ironing board, and, "my hand was about six inches from the top of the ironing board under the roller," the machine closed up on her hand and that she had not put her foot upon the treadle nor done anything else to make it "close up;" that as soon as plaintiff was able she pulled her hand out of the machine and that the hand was badly burned, mashed, and all the flesh was taken off, as were parts of several of her finger nails. Plaintiff further testified that she did not know what caused the machine to close up except that it was out of order; that on two or three occasions when it acted that way she had reported the matter to Mr. Klaus, who was the manager of the defendant laundry company and that he had said: "Go on working on that machine; there is nothing the matter with it," and that under his instructions she had continued to work on the machine.

On cross-examination plaintiff testified that: "The ironing machine would go all the way back when it started without your having your foot on the treadle. It went almost all the way back when it caught my hand. My sister saw it too. . . . When I got my hand caught in the machine I was ironing a coat. I was

ironing the collar and had the coat slipped over the ironing board At the time of my injury I had the collar close up to the top of the ironing board. I could have put the collar across the middle or down near the end of the board or close to myself, but it would have made no difference. The machine would have caught my hand anyway."

Plaintiff further testified that the ironing machine moved slowly when the machine was in order, but that when it closed up of its own accord without any pressure on the treadle, "it closed up right quick. When the machine is operated properly and not out of order the board moves gradually up under the iron and the iron simply turns around under the board. On the occasion that I was injured it went up rapidly and not in accordance with the regular course—it just closed up right quick. I am positive of that." That when the machine was out of order the ironing board did not run quite all the way down under the iron. It did not run as far as when starting of its own accord when out of order, as it does when put in operation by pressure on the treadle; that when out of order it lacks about six or eight inches of going to the end of the board.

Plaintiff further testified that it was necessary, "for me to put my hands on the ironing board to straighten out the collar. I could not have straightened it out by putting by hand down to the side of the board and stretching it across that way—that would not take all the wrinkles out of the collar. . . . This machine had closed up that way seven or eight times during the month I worked on it and I thought that by being careful I could operate the machine without getting injured. I told Mr. Klaus that the machine went up some times by itself and did not work right. He said, 'Go on and work it; there is nothing wrong with it.' I do not know how many times I told Mr. Klaus. The last time I told him was two or three days before I got hurt. I told him a number of times."

Ida Elriod, a witness for plaintiff, testified that she was working for the defendant company on the

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machine next to plaintiff at the time plaintiff met with her injuries. She testified that she had on one occasion seen the ironing machine, at which plaintiff met with her injuries, operate of its own accord without any one pushing down the treadle. As the witness expressed it: "I knew this machine to jump or close up on one occasion."

Core McKinney testified for plaintiff that she was a sister of plaintiff and was in the employ of the defendant company at the time plaintiff met with her injuries and was operating the third machine from her; that she had seen the ironing machine at which plaintiff met with her injuries close up without the treadle being pressed; that she saw the machine of its own accord close up when another woman other than the plaintiff was operating it, and also saw the machine close up while the plaintiff, her sister, was working on it.

William J. Klaus was a witness for defendant. He testified that he was the manager of the defendant company and had been so for ten years and that he looked after the second floor of the laundry where the various machines were located, upon which floor was the machine upon which plaintiff met with her injuries; that the ironing machine had an automatic device which, when the foot is taken off the pedal, automatically throws the machine out of operation and it would be impossible for the machine to run farther than the board; that when the foot is taken off the pedal the machine would run perhaps an inch before stopping; that he had never known this particular ironing machine to start without putting a foot on the pedal; that plaintiff had been working on this machine about seven weeks and that during that time she had not made any complaint of the machine being out of order or defective, nor had she requested him at any time to make any repairs, and that the machine was not out of order in any way at the time she was injured and that the machine was never out of order and the company had never spent five cents on it for repairs.

In answer to the court's question: "Why should this machine start without using that treadle?" he answered: "It only started once and at that time the screw in the shifter came loose and it ran back and forward there for six inches. I tightened up the screw in the shifter about a week afterwards, or it may have been ten days afterward. At that time my attention was called to the fact that the machine was automatically shifting. It is a set screw in the shifter that came loose."

On cross-examination Klaus stated that it was his duty to oversee the machines and repair them if anything was wrong; that plaintiff never at any time made a complaint about the machine, and that he did not tell her to go ahead and work on it; that at the time the plaintiff was injured he was down in the boiler room. He further stated that the pressure from the iron onto the ironing board was about 1500 pounds; that, "if you caught your hand between the ironing board and iron and put your foot on the pedal, you never could get out."

Charles Reisenweber testified for the defendant that he was the inventor of the machine in question; that the machine was equipped with an automatic shifter so that when the foot was taken off the pedal the machine would come to a standstill.

Two witnesses for the defendant testified that they were in the employ of the defendant company at the time plaintiff met with her injuries and for some time prior thereto, and each testified that they had never seen anything wrong with the machine in question.

At the close of plaintiff's case, and again at the close of the entire case, the defendant requested the court to instruct the jury that under the law and the evidence they must return a verdict in favor of the defendant, each of which was refused by the court. This is assigned as error on the ground that it appears from plaintiff's testimony below that the machine in question could have been operated in two ways, one safe, and one unsafe, and that the plaintiff chose to

operate the machine in the unsafe way, which constituted contributory negligence, and plaintiff was therefore not entitled to recover. And further that even though, for the sake of argument, it be granted that the manner of operating the machine adopted by plaintiff was the only one available, still it was so obviously dangerous that its adoption by plaintiff constituted contributory negligence, and she was therefore not entitled to recover.

We have set out the testimony in this case in our statement of facts more fully than usual because learned counsel for appellant argues this point most earnestly. After a careful study of the record in this case we are clearly of the opinion that the point contended for by appellant is untenable. While it is undoubtedly the law that even though no plea of contributory negligence is set up by the defendant, yet whenever it is shown by plaintiff's own proof that there was contributory negligence such as to preclude recovery, the trial court should take the case from the jury upon a demurrer to the evidence. [Sissel v. Railroad Co., 214 Mo. 515, 113 S. W. 1083; Hudson v. Railroad Co., 101 Mo. 13, 14 S. W. 15.] An examination of plaintiff's proof in this case does not show circumstances of contributory negligence which could be held in law to absolutely defeat her right of action and to disprove her own case. There is such a conflict in plaintiff's testimony regarding the question as to whether the machine could have been operated in two ways, one of which would have been safe, and the other unsafe, that the court properly refused to hold, as a matter of law, that plaintiff was guilty of contributory negligence, and properly submitted the question to the jury.

As to the contributory negligence pleaded by the defendant in its answer, the issue thus raised was fully and correctly submitted to the jury under proper instructions. We rule this point against the appellant.

Appellant next complains of plaintiff's instruction No. 2, given by the court, which instruction reads as follows:

“The court instructs the jury that, even though you may believe from the evidence that the plaintiff knew or by the exercise of ordinary care could have known, *that the ironing machine was out of order and dangerous at the time she was injured*, yet this does not defeat her right of recovery in this case, if you believe from the evidence that she was negligently furnished and ordered by defendant’s foreman to operate said machine, unless the danger of injury by using it was so glaring as to threaten immediate injury, and that an ordinarily prudent person in plaintiff’s position would have refused to work at said machine.”

Appellant contends this instruction contains prejudicial error; that the instruction purports to cover the entire case and entirely ignores the duties imposed upon the plaintiff under all the facts; that it is the duty of the employee, when furnished defective appliances by his employer, first to exercise ordinary care in determining whether or not he can safely continue the operation of the appliance or machine, and second, that, after having determined this question in the affirmative, there remains the further duty of exercising ordinary care in the manner of that operation. The point is further made that the instruction proceeds upon the theory that the existence of the defect in the machine was conceded by both parties, and that there was no question upon that point for the jury to determine, when in point of fact it was one of the issues in the case. We hold that the instruction complained of does not purport to cover the whole case, nor does it tell the jury that if they find the facts as alleged in the instruction, that they shall return a verdict in favor of plaintiff. While the instruction is properly subject to criticism, we hold that its defects were cured by the plaintiff’s instruction No. 1, given by the court, which correctly and fully covered the entire case and predicates a finding upon all the essential facts necessary for the jury to believe and find before they can return a verdict in favor of plaintiff. As was said in the case of *Hughes v. Railroad Co.*, 127 Mo. 447, 1.

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c. 452, 30 S. W. 127: "This court has repeatedly held, since the decision in the case of Owens v. Railroad, decided in the 95th Mo. 169, overruling the contrary doctrine announced in the case of Sullivan v. Railroad, decided in the 88th Mo. 182, as well as in numerous cases earlier than the Sullivan case, that, where a series of instructions taken together contain a complete exposition of the law and covers every phase of the case, the verdicts obtained thereon will be sustained, even though the instructions when taken separately may be incomplete, and open to objection and criticism; that, if, taken together, the full law of the case can be ascertained, they are complete, and there is no necessity for 'qualifying each instruction, by an express reference to the others.'"

Taking all the instructions together the case was fairly and fully presented to the jury. We find no prejudicial error therein.

The appellant makes one further point that the case should be reversed and remanded because of the conduct of counsel for plaintiff in his argument to the jury at the close of the case. With reference to this point the record is as follows:

"Mr. Comer (attorney for plaintiff): In this case, gentlemen of the jury, this young lady here is suing as a poor person. Our law provides that when a person comes into court they must put up the court costs for the necessary machinery, unless they are unable to do that, in which event the litigant will then make an application to the judge and state their circumstances and that they have a meritorious —

Mr. Fisher (attorney for defendant): I object to that line of argument.

Court: Objection sustained. That is not a matter for the consideration of the jury. If the plaintiff is entitled to sue as a poor person it is not a matter for the jury at all, it is a matter for the court.

Mr. Comer: Plaintiff objects to the ruling of the court for this reason. We believe that this is a matter of proper argument on the inference as to the preponder-

ance of evidence on behalf of the parties. The fact that plaintiff had a few witnesses—

The Court: If you want to save your exceptions you will dictate it to the stenographer.

Mr. Comer (continuing):—might give rise to the inference that plaintiff's case was weak for that reason. This matter is properly argued to show the plaintiff's position and inability financially to spend money in searching for and gathering witnesses in her case."

This court has recently passed upon the point in question in the case of *Hartley v. Werner*, 196 S. W. 1072, l. c. 1074, and also in the case of *Milliken v. Larabee*, 192 S. W. 103, l. c. 106. In the latter case we said: "It is a well settled law in this State that, whenever remarks of counsel during the progress of the trial shall amount to a misstatement of a material fact which is considered by the opposing counsel as prejudicial, it is necessary that an objection be noted to the party's remarks alleged to be objectionable, and to call the attention of the trial court to the specific ground on which the objection is based, and that the court be requested to rebuke counsel therefor, and should the court not administer the proper rebuke, counsel should then except to the court's failure to rebuke, and unless the record shows this to have been done, our courts, except in extreme cases, will not grant a new trial on this ground. [*Torreyson v. United Railways Co.*, 246 Mo. 696, l. c. 706, 707, 152 S. W. 32; *State v. McMullin*, 170 Mo. 608, l. c. 632, 71 S. W. 221; *State v. Phillips*, 233 Mo. 299, l. c. 306, 135 S. W. 4.]"

Learned counsel for defendant did not request the court to rebuke counsel for plaintiff for the alleged improper argument and the trial court cannot be held to have committed error because of its failure to do something which it was not asked to do.

Counsel for defendant, had he felt that the alleged misconduct on the part of the attorney for plaintiff in point of fact tended to prejudice and would prejudice the jury against the defendant, and in favor of the plaintiff, had available a motion to discharge the jury

and declare a mistrial. Under the facts as disclosed by the record we will not predicate the granting of a new trial on this ground.

We have gone over the entire record and considered the assignments of error made on behalf of the appellant but find no prejudicial error, and we hold the judgment is for the right party and the judgment is accordingly affirmed. *Reynolds, P. J., and Allen, J., concur.*

**AUGUSTA M. ZINKE, Respondent, v. KNIGHTS OF
THE MACCABEES OF THE WORLD, Appellant.**

St. Louis Court of Appeals. Opinion Filed January 8, 1918.

1. **ACCORD AND SATISFACTION: Evidence: Burden of Proof.** The burden of proving the issue as to whether there was an accord and satisfaction, is upon the party who sets same up as an affirmative defense.
2. ———: ———: **Sufficient to Go to Jury.** Whether there is evidence of accord and satisfaction sufficient to go to the jury, is a question of law for the court.
3. ———: ———: **When a Question of Law.** Where the facts in respect to an accord and satisfaction have been ascertained or are not in dispute, their effect is purely a question of law for the court, and is not to be submitted to the jury.
4. ———: **New Contract: Validity: Consideration.** Where a fraternal benefit association paid the beneficiary of a certificate twice the amount of the premiums paid in by the member on the theory that he had committed suicide, and in an action for the full amount of the certificate asserted that such payment was an accord and satisfaction, which is a method of adjusting a contract or a tort by substituting for such contract or cause of action an agreement for the satisfaction thereof and an execution of such substituted agreement, the payment cannot be sustained as an accord and satisfaction, there being no new contract between the parties nor any consideration on which to base the same; the benefit certificate merely providing that in case of suicide the association should be liable only for twice the amount of the premiums paid in by the member.
5. **INSURANCE: Fraternal Insurance: Action: Tender: Necessity.** Where the beneficiary in a certificate issued by a fraternal benefit

association would in all events be entitled to retain the amount paid, the association contending that it was liable only for reduced amount because the member committed suicide, the beneficiary in an action to recover the face value of the certificate need not tender a return of the amount received.

6. ———: ———: **Evidence: Admissions.** Where a notary engaged by a fraternal benefit association inserted in the proofs of death that the cause of death was suicide, and the beneficiary in the certificate accepted a check for the amount to which she was entitled in case the member had met his death by suicide, the beneficiary was neither estopped from denying that the member came to his death by suicide nor conclusively bound by the admissions in the proof of death, but was entitled to explain or deny them and show they were made as a result of erroneous information or without information.
7. ———: ———: ———: **Suicide: Question for Jury.** In an action on a certificate issued by a fraternal benefit association, the question whether the member met his death by suicide, *held*, under the evidence, a question for the jury.

Appeal from the Circuit Court of the City of St. Louis.

—*Hon. William M. Kinsey*, Judge.

AFFIRMED.

R. P. & C. B. Williams for appellant; *D. D. Aitken*, general counsel.

(1) If there was a substantial controversy between plaintiff and defendant as to what defendant owed the plaintiff on the benefit certificate, and this controversy arose in consequence of a bona-fide and plausible claim by defendant that there was due under the benefit certificate, by reason of the fact that the member committed suicide, only \$578.40, this was a consideration for the payment and acceptance of this amount in full of all claims on the benefit certificate. *Coal Co. v. Coal Co.*, 127 Mo. App. 320, 324; *Woodmen of the World v. Bridges*, 165 Fed. 342; *Chamberlain v. Smith*, 110 Mo. App. 657, 660; *Bahrenburg v. Conrad*, 128 Mo. App. 526; *Pohlman v. City of St. Louis*, 145 Mo. 551; *McCormick v. City of St. Louis*, 166 Mo. 315; *Railroad v. Clark*, 178 U. S. 353, 44 L. Ed. 1099; *Perkins v.*

Headley, 49 Mo. App. 556, 562; Ogilvie v. Lee, 138 S. W. 926. (2) The amount due on the benefit certificate at the time of the payment of \$578.40 was unliquidated. It was one or the other of two amounts. In the event of suicide of the member, it was \$578.40. In the event of accidental or natural death, it was \$1,000. This, as applied to the subject of accord and satisfaction, made the claim of the plaintiff at the time of the payment, unliquidated, and the payment by the defendant and acceptance by plaintiff of the sum of \$578.40 in full of her claim on the benefit certificate is conclusive. Pohlman v. City of St. Louis, 145 Mo. 651; McCormick v. City of St. Louis, 166 Mo. 315, 335; Scott v. Realty Co., 241 Mo. 112, 135; Perkins v. Headley, 49 Mo. App. 556, 562; Railroad v. Clark, 178 U. S. 353, 44 L. Ed. 1099; Nassoiv v. Tomlinson, 148 N. Y. 326, 51 Am. St. 697, 42 N. E. 715; Camp v. Raymond, 175 N. Y. 102, 67 N. E. 113; Simmons v. Supreme Lodge, 70 N. E. 776; Camp v. Raymond, 58 N. Y. S. 909; Coffey v. Lumber Co., 139 App. Div. 746; Palmerton v. Hoxford, 4 Denio, 166, 167; Lestienne v. Ernest, 5 App. Div. 373; Ostrander v. Scott, 43 N. E. 1091; Bingham v. Browning, 64 N. E. 317, 321; Ferguson v. Grand Lodge, 156 N. W. 176; Greenleaf v. Monot, 116 Ia. 535; Sparks v. Spaulding, 158 Ia. 491; Neeley v. Thompson, 68 Kans. 193; Treat v. Price, 47 Neb. 875; Lanier v. Merrill, 108 Mich. 58, 62 Am. St. 687; N. Y. Life Ins. Co. v. McDonald, 160 Pac. 193. (3) Where the debtor concedes an amount to be due his creditor, and the creditor claims a greater sum, the creditor has the right to withhold payment, unless a receipt in full is given, and this is a consideration for the receipt in full of the entire claim. Scott v. Realty Co., 241 Mo. 112, 135. (4) Settlements between insurer and insured have all the elements of a contract and are incapable of rescission by one party as any other contract. Such settlements are binding in the absence of fraud, deceit or duress. Frey v. Insurance Co., 189 Mo. App. 696; Georgia Home Ins. Co. v. Wortham, 113 Ala. 479, 59 Am. St. 129; McLain v. Insurance Co., 122 Ia. 355;

Davis v. Phoenix Ins. Co., 81 Mo. App. 264; Howard v. Georgia Home Ins. Co., 102 Ga. 137; Benson v. Prudential Ins. Co., 13 Pa. Super. Ct. 363; Clanton v. Insurance Co., 101 Mo. App. 312, 322; Wood v. Mass. Accident Assn., 54 N. E. 541; Biddlecomb v. General Accident Co., 152 S. E. 103, 106; Dodt v. Prudential Ins. Co., 186 Mo. App. 168; Brady v. Insurance Co., 180 Mo. App. 214; 3 Bouviers Law Dict., page 2823 under "Receipts in full." (5) When a party by word or conduct voluntarily induces another to act in view of a certain state of facts, he will be estopped to allege against him a different state of facts, to his prejudice. Cornwall v. Gainer, 85 Mo. App. 684; Reynolds v. Kraft, 144 Mo. 433, 477; State ex rel. v. Branch, 151 Mo. 622, 639; 11 Am. and Eng. Encyc. Law (2 Ed.), p. 421; Grundy v. Webb, 48 Mo. 562; Woodmen of the World v. Bridges, 165 Fed. 342. (6) The beneficiary furnishing preliminary proofs of death showing suicide of the member and settling with the defendant, receiving the amount due her in case of suicide, and receipting in full for all claims on the certificate, without informing the society prior to the settlement that the proofs of death did not state the true facts, is estopped from making claim contrary to this statement. Ben. Ins. Co. v. Newton, 22 Wallace 32, 22 L. Ed. 763; Campbell v. Insurance Co., 10 Allen, 213, 219; Irvin v. Insurance Co., 1 Bos. 507; Employers Liability v. Anderson, 74 Kan. App. 18-23; Sage v. Finney, 156 Mo. App. 30-42. (a) It is the law of this State that an admission of suicide in preliminary proof of death under a policy of insurance is conclusive against the claimant on the trial of the case, for the amount agreed to be paid, where such admission is not in some way disaffirmed or explained. Stephens v. Insurance Co., 190 Mo. App. 680; Kastens v. Supreme Lodge, 190 Mo. App. 65; Hammond v. Benefit Society, 148 Mo. App. 33. (7) The court should have submitted the question of accord and satisfaction to the jury, and should have given instructions 1-c and 1-f, requested by the defendant and refused by the court, and should

not have instructed the jury that there was no consideration for the release. *Barrett v. Kern*, 141 Mo. App. 23; *Bahrenburg v. Fruit Co.*, 128 Mo. App. 526; *Heitland v. Culver*, 181 Mo. App. 697. (8) Plaintiff having received \$578.40 in full of all claims on the benefit certificate and defendant having paid the amount with such understanding, plaintiff cannot maintain this suit without tendering back to defendant the amount received. This would operate as a fraud on defendant, and deprive it of the legal right it had to refuse to pay said amount without a release of the entire claim. *Boehm v. American Patriots*, 172 Mo. App. 104; *Carroll v. United Railway Co.*, 157 Mo. App. 247-289; *Frey v. Prudential Ins. Co.*, 189 Mo. App. 696.

Durham & Durham by *Geo. O. Durham* for respondent.

(1) (a) It is not every unliquidated demand upon which a payment is made that is within the rule as to accord and satisfaction. *Rogers v. Nee*, 194 Mo. App. 163; *Dodt v. Insurance Co.*, 186 Mo. App. 168; *Pollman v. St. Louis*, 145 Mo. 651. (b) There must be a substantial controversy concerning the claim. *Bahrenburg v. Fruit Co.*, 128 Mo. App. 526, conceded by appellant brief, p. 13; 1 C. J. 358. (c) An accord and satisfaction requires an agreement, an *aggregatio mentium*. If the obligation sought to be extinguished arises from contract it requires the substitution of a new agreement in place of the old. 1 C. J. 527; *Barrett v. Kern*, 141 Mo. App. 24; *Perkins v. Headley* 49 Mo. App. 561, *Barcus v. Case T. M. Co.*, 197 S. W. 478; (d) There was no evidence that the money was tendered by way of compromise; there was no evidence that plaintiff had claimed any particular sum; the intention was to pay the suicide benefit thinking this was the entire obligation and the receipt so recites. In view of the fact that suicide was not proven, this was shown to be a mistake, and the sum paid was not the full amount due under the suicide by-laws or any other laws, and was not a bar to plaintiff's recovery. *Dodt v. Insurance Co.*, 186 Mo.

App. 168. (2) Settlements between insurance companies and the insured are of course binding if fair and in the absence of fraud, deceit, duress or mistake as other contracts. The cases cited by appellant, however, limit the rule to cases of fair and well understood cases of compromise. *Dodt v. Insurance Co.*, 186 Mo. App. 174; *Pollman v. St Louis*, 145 Mo. 651; *Rogers v. Nee*, 194 Mo. App. 163. (3) Beneficiary is not conclusively bound by even her own admissions appearing in the proofs of death and she may explain, or deny them or show that they were made as a result of erroneous information or no information at all. *Remfry v. Insurance Co.*, 196 S. W. 775; *Sage v. Finney*, 156 Mo. App. 30-42; *Stephens v. Insurance Co.*, 190 Mo. App. 680; *Kastens v. Supreme Lodge*, 190 App. 65; *Hammond v. Benefit S.*, 148 App. 33; *Grey v. Ind. Order of Foresters*, 196 S. W. 779. (4) The court properly refused to submit the issue of accord and satisfaction to the jury. There was no evidence that the money was paid by way of compromise of a disputed claim or to settle a controversy. On the contrary it conclusively appeared that the party paid the money with the intention of executing an old contract, and on the theory that the insured committed suicide. 1 C. J. 414; *Barcus v. Case T. M. Co.*, 197 S. W. 478. (5) The transaction whereby the money was paid did not amount to a new contract of release or compromise, rendering it necessary for plaintiff to obtain equitable relief in setting aside such contract nor require her to tender back what she had received as prerequisite to maintaining such equitable action. The money was paid on the old contract and was a discharge only *pro tanto*. *Dodt v. Insurance Co.*, 186 Mo. App. 168. (6) The suicide provision was no part of the contract of insurance between the defendant and plaintiff's husband. There was a conflict between the application and the policy in that the application offered as a basis of the contract a provision rendering the contract void in case of suicide. This was in conflict with the by-laws and in conflict with the policy as written. In case of a conflict between the

application and the policy the policy governs. *Laker v. Fraternal Union*, 95 Mo. App. 353; *Westermann v. Woodmen*, 236 Mo. 326; *Pledger v. Assn.*, 197 S. W. 88. Since by the terms of the contract suicide was no defense, the claim could not have been in dispute and a partial payment could in no case satisfy the entire debt. *Pollman Coal Co. v. St Louis*, 145 Mo. 651.

BECKER, J.—Plaintiff instituted this action before a justice of the peace by filing a statement in which she claimed that she was beneficiary in a benefit certificate issued on the life of her husband, Ferdinand G. Zinke, in the sum of \$1000; that the insured departed this life during the time that said benefit certificate was in force and that the association paid plaintiff the sum of \$578.40, leaving a balance of \$421.60 due plaintiff, which balance had been previously demanded and payment refused. From a judgment in favor of plaintiff, in the justice court, the defendant appealed. On a trial *de novo* in the circuit before a judge and jury, a judgment was entered in favor of plaintiff and against the defendant in the sum of \$421.60, and defendant in due course appealed.

It is admitted that the defendant, Knights of the Maccabees of the World, is a corporation, successor to the Supreme Tent, Knights of the Maccabees of the World, and is a fraternal benefit association organized under the laws of the State of Michigan and authorized to do business in the State of Missouri; that the defendant had issued, on the life of Ferdinand G. Zinke, its policy No. 20410, and that at his death one assessment on the membership, not exceeding in amount the sum of \$1000, was to be paid thereunder as a benefit to plaintiff, Augusta M. Zinke, wife of the insured, upon satisfactory proof of his death and the surrender of said certificate; that one assessment on the membership of the defendant company at the time of the death of Ferdinand G. Zinke would have amounted to more than the sum of \$1000. The application of the insured for membership in the defendant order contained the following: "I also agree

that should I commit suicide in contravention of the laws of said Supreme Tent, whether sane or insane at the time, that this contract shall be null and void and of no binding force upon said Supreme Tent." . . . "This application and the laws of said Supreme Tent now in force or that may hereafter be adopted together with my certificate of membership are made the contract between myself and the said Supreme Tent, and I for myself and my beneficiary agree to conform to and be governed thereby." Section 379 of the by-laws of the defendant in force and effect at the time of the decease of the insured provides that; "No benefit shall be paid on account of the death of a member who shall die by his own hand, whether sane or insane; provided, however, that the beneficiary named in the life benefit certificate, or the person legally entitled to the benefit, shall receive an amount equal to twice the amount contributed to the Life Benefit Fund by the member during his lifetime, but not in excess of the face of the certificate."

There is no controversy but that Ferdinand G. Zinke, the insured, paid the defendant association in monthly rates on said certificate, up to the time of his death, \$289.20; that at the time of his death his dues to the association were paid, and that he was in good standing; that on or about the 5th day of June, 1913, sometime after the death of the insured, the defendant association paid to Augusta M. Zinke, the plaintiff, the sum of \$578.40, being twice the amount of the monthly rates contributed to the Life Benefit Fund by Ferdinand G. Zinke, during his lifetime.

The record shows that the insured died on the 31st of March, 1913, and that the beneficiary, plaintiff herein, furnished the defendant preliminary proofs of death, consisting of her own affidavit, the affidavit of the attending physician, the verdict of the coroner's jury, affidavits taken at the coroner's inquest, and the sworn statement of the officers of the subordinate lodge of which the insured was a member. Each of these papers gave the cause of the death of the insured as suicide. The affidavit of the beneficiary contained the following: "Date of

death?" "March 31, 1913." "Remote cause of death?" "Had trouble with his head for about six weeks." "Immediate cause of death?" "Not of sound mind, suicide." The defendant association upon receiving the preliminary proofs of death issued its check, payable to the beneficiary, in the sum of 578.40, which is admitted to be double the amount the insured had paid in during his lifetime. This check together with the receipt prepared by the defendant association, was sent forward to the officers of the local lodge, which it appears was customary, with instructions to turn the same over to the plaintiff upon the execution of the receipt.

It appears that plaintiff did not accept the check immediately but consulted the officers of the local lodge and her attorney and took the matter under advisement for some days. Plaintiff's attorney advised her, "that if it should be found by a trier of the fact that suicide was the cause of her husband's death, that that amount was all that was due under the policy. I advised her further that if he had not committed suicide, that the full amount, namely, \$1000, would be coming to her; and also advised her concerning the necessary steps that it would take in order to test that question in the courts. I tried to put the whole facts and all the circumstances before her for her decision as to whether or not she would accept the amount offered, or fight for the full amount of the policy, \$1000."

It further appears that there was no communication between the plaintiff and the defendant from the date that defendant company mailed the check for \$578.40, together with receipt attached, to the officers of the local lodge. The receipt which plaintiff executed at the time she accepted the check is as follows: "Received from the Knights of the Maccabees of the World, the sum of Five Hundred and Seventy-eight and 40-100 Dollars (\$578.40), that being twice the amount of monthly rates contributed to the life benefit fund of Ferdinand G. Zinke, late a member of Tent No. 116, State or Province of Missouri, and the full amount for

which the association is liable under its laws governing suicide claims. Warrant No. 34275.

AUGUSTA M. ZINKE,

Widow and Beneficiary of Ferdinand G. Zinke.

Witness:

NELSON THOMAS,

JOHANNA ANGERER."

Plaintiff signed the above receipt on the 7th day of June, 1913, and thereafter on the 21st day of July, 1913, wrote a letter, in German, to the defendant, of which letter the record states a correct translation to be as follows: "Gentlemen of the Maccabees: I ask again if the Gentlemen of the Maccabees will pay the rest of \$400, which I can claim under the Missouri law, if not, I will go to the courts. Why can rich people receive their money, where the husband shot himself, and have received their money of \$8000, and a poor woman, who is without any help, shall be cheated. As my husband was already at the edge of the grave, that which he did, he did without knowledge as he was always afraid of death.

Respectfully,

Widow, AUGUSTA M. ZINKE."

On August 4, 1913, the defendant, through its supreme record keeper, mailed the following answer in reply to plaintiff's letter: "Mrs. Augusta M. Zinke, St. Louis, Mo., Dear Madam: Your letter of July 21st, in relation to your husband's benefit insurance, has been received, and in reply permit us to say that at the time your husband joined the Knights of the Maccabees of the World, the laws provided that in case of death by suicide, whether sane or insane, his beneficiary should be entitled to receive twice the amount he had contributed to the life benefit fund. This was paid you in April, last. There is nothing more you're due under the laws of the State of Missouri, or under the laws of the K. O. T. M., or under any other laws. Your husband was a member of an association, acting together for the purpose of providing life benefits or insurance at the least possible cost; and among other

things, they agreed that if any of them should commit suicide, his beneficiary should receive twice the amount he had contributed to the life benefit fund, but in no case to exceed the amount of the certificate. We have no knowledge of what you are talking about, some rich man's beneficiary getting \$8,000, and if she did, or did not, it would not have any bearing in a case like this. She or he might have been entitled to it. The management would very much prefer that your husband had died in some other way so they could have paid it all. They have no interest in it except to carry out the agreements made by the members themselves.

Respectfully yours,

L. E. SISLER, Supreme R. K.

Dictated."

It is admitted that the plaintiff gave notice to the defendant prior to the institution of this suit, that the plaintiff did and would deny that the insured, Ferdinand G. Zinke, deceased, committed suicide and that she claimed her statement in the original proof of death was erroneous and the result of mistake and misapprehension.

Mrs. Augusta M. Zinke, plaintiff, through the intervention of an interpreter, testified that on the morning of the 31st day of March, 1913, she awoke and found her husband, the insured, Ferdinand G. Zinke, was not in his bed and that she called to her daughter, Mrs. Angero, and asked her to see where he could be. A moment later her daughter called and she went to where her daughter was and found the insured lying on his back across the threshold of a hall room; that the insured was dead; that her daughter left the house to call a doctor. She further testified: "I saw a little rope; it was lying there; but there was no signs that he had done something to himself;" that later in the day some of the officers of the local lodge called on her and suggested that they send a Mr. Rauck, a notary public, to her and make out the preliminary proof of death; that Mr. Rauck came there that night or the following day; that Mr. Rauck had a paper with him

which the witness said she signed; that when Rauck asked her what was the cause of her husband's death, she told him brain stroke or heart stroke. Witness specifically denied that she had stated to the notary, in answer to the question as to the cause of her husband's death, "not of sound mind, suicide." Witness stated that the notary wrote down the answers to the questions and then read the paper to her and she signed it, but that she did not read the paper herself.

Witness further testified that she did not know how her husband came to his death and was permitted to answer the question: "Do you know whether or not he hung himself or strangled himself with the rope?"

A. "There was no sign of it, that he did it." She testified that her husband had been suffering with kidney trouble and pains in his head for some time prior to the time of his decease. Witness testified she was not present at the coroner's inquest.

Johanna Angero testified for plaintiff that she was the daughter of the insured; that on the day in question her mother called her and told her her father was not in bed and she immediately looked for him and that as she opened the door to a hall room the body of the insured fell across the threshold, "it seems like it was just as if someone would just be standing there leaning up against the door and you open it sudden like and they would fall down." She did not make any examination to find out the cause of his death at the time; she did not see any rope nor did she change the position of the body in any way. She testified that the insured had been suffering with kidney trouble for two years before his death and he frequently got dizzy spells which would require him to lay down as everything got black in front of his eyes. She testified that the notary came to the house and that she was present when her mother answered the questions asked by the notary, and that the questions were asked in English; that she particularly remembered the question as to the cause of the death being asked her mother, and that her mother answered that it

was due to brain stroke or heart stroke; that her mother signed and swore to the contents of the paper in her presence; that the following morning the notary returned to the house and stated to her that her father had died of suicide; that the witness told him she wouldn't believe him, that it wasn't true, to which the notary replied that it was so, that he had found it out at the city hall; that he said, "he wanted a dollar to go to the city hall and get something, I don't know what it was about." She was asked the question: "Did he write anything down there?" A. "Why, yes." Q. "Did you see what he wrote down there?" A. "I couldn't see for sure if he wrote anything down or scratched anything out, but I seen him handle his pen; that is all." Q. "On that occasion did he obtain your mother's signature to any paper; on that occasion when he came back the second time?" A. "No, sir." Q. "Did he ask her anything?" A. "No, sir." Q. "Did he talk to her at all?" A. "No, sir."

The witness further testified that neither she nor her mother saw the certificates of the doctors which went to make up the preliminary proofs of death. Witness further testified that she had herself called in Dr. Bram immediately after finding the body of the insured, and that she was present when he made his examination; that she saw no rope there at the time.

On cross-examination witness testified that Mr. Rauck, the notary public, said that he was sent there by the lodge and that she was present at all times during the conversation Mr. Rauck and her mother had, and that at no time was anything said with reference to the cause of the death of the insured being suicide; that she distinctly heard her mother tell the notary that her father had died of brain stroke or heart stroke.

Otto L. Rauck, testified for the defendant and stated that he was a notary and at the suggestion of the local officers of the lodge he took the necessary blanks for proving preliminary proofs of death, and went down to Mrs. Zinke's, where he asked her the

questions appearing upon the beneficiary's affidavit, and that he wrote in the answers that Mrs. Zinke gave him; that he also obtained the doctor's certificates but that he did not read them to Mrs. Zinke. He testified that he went down there the second time to see about the coroner's papers and that he obtained the report of the coroner's inquest but did not read it to Mrs. Zinke. The witness was asked: "Do you recall that you asked her, 'Immediate cause of death.' and she said, 'Not of sound mind—suicide?' You said that was asked in German, I believe?" A. "Yes, sir." Q. "And what she replied couldn't be interpreted as anything else except, 'Not of sound mind.' " A. "Possibly she didn't use just those exact words, but the meaning is the same." . . . Q. "Didn't you write down in here that night that he died of brain stroke, had trouble with his head, and died of brain stroke, and afterwards erased it and put this statement in there?" A. "Not to my knowledge." Q. "Well, you would have known it if you had done it?" A. "Well, that is two years ago."

Benjamin Wolff, a witness for the defendant, testified that he was commander of the Anderson Tent of which the insured was a member, and was its presiding officer, and that upon learning of the death of the insured he called upon the beneficiary at her home. The beneficiary stated to him that the deceased had been sick for some time—not able to work—and that his death was sudden; that the beneficiary did not state what was the cause of the insured's death; that he asked the beneficiary if she had in mind a notary whom she would prefer to have make out the preliminary proof of death and upon her stating that she did not, he said he would give the necessary blanks to a notary and send him out to her, and that he thereafter sent Mr. Rauck to plaintiff.

Dr. J. C. Bram, a witness for the defendant, testified that he was a physician and was called to plaintiff's apartment. He found the insured lying dead just outside a little hall room with his feet just inside and a small rope was around his neck.

Learned counsel for appellant submits that the main question arising by this appeal is the legal effect of the receipt or release dated June 7, 1913, introduced in evidence by the defendant. This receipt or release was excluded from the consideration of the jury by the court's own instruction and for the reason that the court was of the opinion that said receipt or release was not supported by any consideration and therefore not binding upon the plaintiff. The giving of said instruction by the court is complained of as erroneous.

Appellant's argument is based on the supposition that the record shows that there was a substantial controversy between plaintiff and defendant as to what defendant owed the plaintiff on the benefit certificate; that this controversy arose in consequence of the bona-fide and plausible claim by defendant that the insured had committed suicide and therefore there was due under the benefit certificate but \$578.40, whereas the plaintiff claimed \$1000 as the amount due her as beneficiary thereunder, and that the payment of the \$578.40 and the acceptance of such amount under the receipt as set out in full above, signed by the beneficiary, furnished sufficient consideration to make the transaction one of accord and satisfaction as between plaintiff and defendant and that the court should have submitted that issue to the jury. We must rule this point against appellant.

To begin with, the burden of proving the issue as to whether there was an accord and satisfaction was upon the defendant who set up the same as an affirmative defense. [Oil Well Supply Co. v. Wolfe, 127 Mo. 611, l. c. 625, 30 S. W. 145; Barrett v. Kern, 141 Mo. App. 5, l. c. 23, 121 S. W. 774; Bahrenburg v. Fruit Co., 128 Mo. App. 526, 107 S. W. 449.] And, "whether or not there is evidence of accord and satisfaction sufficient for submission to the jury is a question of law for the court, and where the facts in respect to accord and satisfaction have been ascertained or are not in dispute, their effect is purely a question of law for the court and is not

to be submitted to the jury." [1 Corpus Juris., 583. See, also, Barrett v. Kern, supra.]

The undisputed evidence shows that upon the death of the insured the commander of the local lodge furnished plaintiff with a notary public who made up her proof of death in which, correctly or incorrectly, the cause of death was given as suicide. It is not in evidence that the plaintiff in the proof of death demanded any sum from the defendant. Immediately upon the receipt of this proof the defendant made out its check for \$578.40 and sent the same in the usual course to the officers of the local lodge who the record discloses were without any authority to negotiate with the plaintiff but merely were authorized to deliver the check to plaintiff upon her signing a receipt in the form usually required by the defendant. The plaintiff considered the matter for several days and finally accepted the check and signed the receipt. It is to be noted in this connection that the receipt does not recite that it is in full of plaintiff's claim under the benefit certificate but states that the sum of \$578.40 is, "the full amount for which the association is liable under its laws governing suicide claims." We hold that the facts in this case fail to show any new contract or any consideration on which to base an accord and satisfaction. "An accord and satisfaction is a method of adjusting a contract or a tort by substituting for such contract or cause of action, an agreement for the satisfaction thereof, and an execution of such substituted agreement." [1 R. C. L., 177.] As was said by this court in the case of Barrett v. Kern, 141 Mo. App. 5, l. c. 24: "It is of the very essence of accord and satisfaction that it finally and definitely closes the matter covered by it. Nothing of or pertaining to that matter must be left unsettled or open to further question or arrangement. In law it is a new contract, founded on a new consideration and, to be enforceable, it must have all the essential elements of a contract, among them, mutuality and certainty." The undisputed facts in this case clearly fall short of bringing the case within the rule, and the trial court properly refused to submit

the issue of accord and satisfaction to the jury. [See Goodson, et al. v. National Masonic Accident Assn., 91 Mo. App. 1. c. 353.]

It is assigned as error that the plaintiff did not tender to the defendant the sum of \$578.40, which plaintiff acknowledges to have received from the defendant. This point is without merit as the plaintiff in any event would be entitled to retain that amount, and it has repeatedly been held that a party need not make a tender of an amount received under such circumstances. [Alexander v. Railroad, 54 Mo. App. 66; Winter v. Railroad, 160 Mo. 159, 61 S. W. 606.]

As to the point that plaintiff, having sent forward her preliminary proof of death which contained the statement that her husband committed suicide, and having accepted the check sent to her by the defendant, is now estopped from denying that the member came to his death by suicide, we hold this is not the law. The beneficiary, plaintiff herein, was not conclusively bound by the admissions contained in her proof of death, but she was properly permitted to explain or deny them or to show that they were made as a result of erroneous information or without any information at all. [Remfry v. Ins Co., —Mo. App.— 196 S. W. 775; Grey v. Independent Order of Foresters,—Mo. App.—, 196 S. W. 779; Sage v. Finney, 156 Mo. App. 30, 1. c. 42, 135 S. W. 996; Stephens v. Ins. Co., 190 Mo. App. 673, 176 S. W. 253; Queathem v. Modern Woodmen, 148 Mo. App. 33, 127 S. W. 651.]

Plaintiff's testimony, together with that of her daughter, with reference to the answers made by the plaintiff to the questions propounded to her by the notary who made up the affidavit of the beneficiary herein, was amply sufficient to require the question of suicide or no suicide to be submitted to the jury upon proper instructions.

We have examined the instructions given by the court and they fully and properly submitted the case to the jury, and in view of what we have said above there

was no error in the court's refusal to give the instruction asked for by the defendant.

Finding no error in the case the judgment is affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

ST. PAUL MACHINERY MANUFACTURING COMPANY, a Corporation, Appellant, v. HENRY GAUS & SONS MANUFACTURING COMPANY, a Corporation, Respondent.

St. Louis Court of Appeals. Submitted on Briefs December 4, 1917. Opinion Filed January 8, 1918.

1. **JUDGMENTS: Inadequate Damages: Verdict: Must Conform to Evidence.** In an action for the value of machinery destroyed, when the only testimony as to its value was, that it was worth \$2000, a verdict for \$500 cannot be sustained, as there is an absence of any evidence to support it.
2. **TRIAL PRACTICE: Instructions: Invited Error.** In an action for value of machinery destroyed, a requested instruction to assess damages for plaintiff at such sum, not exceeding \$2000, as the jury found the reasonable value to be, did not invite the error in finding a verdict for \$500, which was absolutely unsupported by any evidence.
3. **APPELLATE PRACTICE: Trial Practice: Disposition of Cause.** It is for the jury, or the court, if trial without a jury, to fix the amount of recovery in accordance with the evidence in the case—not the appellate court.

Appeal from the Circuit Court of the City of St. Louis.

—*Hon. Thomas C. Hennings*, Judge.

REVERSED AND REMANDED.

Nagel & Kirby and *E. G. Curtis* for appellant.

In cases of breach of contract or of injury to property which has fixed standards of value, where the evidence is uncontradicted, the jury has no right to find a lower value than the evidence showed, but in

case they do find a lower value the court should set aside the verdict. *Fischer v. St. Louis*, 189 Mo. 567; *Leahy v. Davis*, 121 Mo. 227; *Pritchett v. Hewitt*, 91 Mo. 547; *Watson v. Harmon*, 85 Mo. 443; *Morris v. Railroad*, 136 Mo. App. 393; *Edwards v. Mo. Pac. Ry. Co.*, 82 Mo. App. 478.

Reynolds & Harlan and *Chase Morsey* for respondent.

(1) A party cannot avail himself of an error in a verdict which was produced by an instruction which he, himself, requested, and which was given by the court. *Huppert v. Weisgerber*, 25 Mo. App. 95; *Ellis v. Harrison*, 104 Mo. 270; *Gale v. Mo. Car & Foundry Company*, 177 Mo. 427; *Thummel v. Surplus*, 262 Mo. 651. (2) A party cannot invite the trial court to submit a question to the jury as though the evidence upon it was contradictory, and then obtain a reversal for error in submitting it. *Vrooman v. Goodman*, 145 Mo. App. 653; *Gloyd v. Franck* 248 Mo. 468. Having requested the court to instruct the jury that they could fix the value of the machines, appellant cannot now object to the value fixed by the jury, for the reason that the error, if any, was invited by appellant. *Snoqualmi Realty Co. v. Moynihan*, 179 Mo. 629; *Stewart v. Outhwaite*, 141 Mo. 562; *Sprague v. Sea*, 152 Mo. 327; *State v. Manicke*, 139 Mo. 545; *Carlin v. Haynes*, 74 Mo. App. 34; *State v. Palmer*, 161 Mo. 152.

REYNOLDS, P. J.—This is an action to recover the value of certain machinery originally leased by plaintiff's predecessor to the defendant, destroyed after the termination of the lease and after notice by plaintiff to return the same in accordance with the provisions of the lease. The petition setting out that the machinery had been leased to defendant, that the lease had been terminated, that defendant had failed to return the machinery to plaintiff, as provided by the lease, judgment is prayed in the sum of \$2000, alleged to have been the value of the machinery.

The answer admitted the execution of the lease and possession of the machinery by defendant until it was destroyed by fire in defendant's factory, and avers that in accordance with the provisions of the lease on or about August 22, 1906, defendant, after paying the rent provided for in the lease for a term of five years, gave plaintiff notice in writing that on and after February 8, 1907, the lease would be terminated and plaintiff would not pay any more rent for the machinery. It is further set up that by virtue of the provisions of the lease it was the duty of defendant to return the machinery to plaintiff within ten days after February 8, 1907; that at the special instance and request of plaintiff the machinery was not returned to plaintiff within the ten days but was allowed to remain in defendant's place of business awaiting shipping instructions from plaintiff; that the machinery was packed, marked in plaintiff's name and allowed to remain in defendant's factory subject to the orders of plaintiff and that thereafter on numerous occasions the defendant had advised plaintiff that it was short of room in its factory and requested plaintiff to give shipping instructions for the return of the machinery; that while the lease was in full force and effect defendant had insured it in the name of the lessor (plaintiff) for not less than \$2000 for each set of machines but that after the termination of the lease defendant had allowed the insurance to lapse and while the machinery was still in defendant's place of business a fire occurred and destroyed the machinery together with plaintiff's entire factory and that by reason of these facts it is not liable to plaintiff for the value of the machinery.

This was replied to and on a trial before the court and a jury the jury returned a verdict in favor of plaintiff on the issues joined and assessed its damages at the sum of \$500 with interest thereon at 6 per cent. per annum from April 8, 1909, being \$178.75, aggregating \$678.75. In due time plaintiff filed a motion for new trial as well as in arrest and these being overruled plaintiff has duly appealed.

The material provisions of the lease are these:

"Ninth: The lessee (defendant) shall keep said machinery insured in the name of the lessor (plaintiff) for not less than two thousand dollars (\$2000) for each set of machines, and in default thereof, the lessee shall be personally accountable to the lessor to the extent of the full value, in case the machinery shall be destroyed, and to the extent of any damage which may be inflicted in case it shall be only damaged or partially destroyed.

"Tenth: This lease may be terminated by the lessee after he shall have paid the rent herein provided for a term of not less than five (5) years by giving six months' notice in writing and returning the machines within ten days after the expiration of said six months."

There was evidence to the effect that on March 15, 1909, plaintiff verbally and by letter requested defendant to return the machinery "f. o. b. St. Paul." On March 12, 1909, defendant wrote to plaintiff that it had the machinery set aside and would like to know what disposition plaintiff wanted to make of it. On April 5, 1909, plaintiff wrote defendant a letter in which, referring to the conversation of March 15, 1909, referred to in the letter of that date, it would say that it is now in a position to use the set of machines, as soon as plaintiff could thoroughly overhaul and place the improvements on them and would thank defendant very much if it would load them and return them to it by freight f. o. b. St. Paul.

A witness for plaintiff testified that he had been selling machinery for about nine years; was familiar with the price and value of the machines in question in secondhand condition, as these machines were, and that the reasonable market value of them as secondhand machines, set up, was \$2000, and that new machines were worth \$3000. On cross-examination this witness testified that although there had been improvements made in the machinery, he had sold machines just like these for \$2000. On part of defendant a witness testified that the machinery had remained in

charge of defendant until April 8, 1909, when it was practically destroyed by fire. It was admitted that the letters above referred to had been received and that the machines had been in the defendant's factory from March 16, 1909, until April 8, when they were burned.

A witness for defendant testified that the president of the plaintiff company had told defendant, in 1906 (so the date is given in the abstract), to keep the machines and that he would let defendant know later what to do with them.

Another witness for defendant also testified that if these machines were in good working order and did what they claimed, they would be worth about \$2500. He further testified, on cross-examination, that it would have taken three days to pack the machines and get rid of them. This was the evidence in the case.

At the instance of plaintiff the court gave to the jury the following instructions:

"The court instructs the jury that if you find from the evidence that plaintiff notified defendant to return the machines described in the evidence, and that after such notification and prior to April 8, 1909, defendant had a reasonable time to return said machines and failed to do so, then your verdict must be for plaintiff.

"The court instructs the jury that if you find in favor of plaintiff you will assess its damages at such sum, not exceeding two thousand dollars (\$2000) as the jury find is the reasonable market value of the machines described in the evidence on the 8th day of April, 1909, with interest at the rate of six per cent (6%) per annum from that date."

The instructions asked by defendant were refused and it is not necessary to notice them, one of them, however, was in the nature of a demurrer to plaintiff's evidence.

It is impossible to sustain this verdict for the amount awarded. This is not a question of passing on the weight of evidence but as the case appears from the abstract, which is unchallenged, it is one of absence

of any evidence to support the verdict. We do not say that the jury were bound to accept the valuation fixed by witnesses, but we do say that there is no evidence whatever in the case warranting the jury in returning a verdict for \$500, with interest on that amount.

Learned counsel for respondent claims that a party cannot avail himself of an error in a verdict which was produced by an instruction which he himself requested and which is given by the court; that he cannot invite the trial court to submit a question to the jury as though the evidence upon it was contradictory and then obtain a reversal for error in submitting it, and that having requested the court to instruct the jury that they could fix the value of the machines, appellant cannot now complain of the value fixed by the jury for the reason that the error, if any, was invited by the appellant. It needs no authority to sustain the proposition that a party cannot avail himself of invited error. But we do not think that the instruction asked by plaintiff and given at its request, invited the error which was here committed. It told the jury that if it found certain facts it could find for the plaintiff and then told the jury that if it found for the plaintiff it should assess its damages at a sum not exceeding \$2000, "as the jury find is the reasonable market value of the machines," with interest. As a matter of course that proceeded on the assumption that in finding the value the jury would be guided by the evidence in the case. It did not do that in the case at bar and its verdict cannot stand.

Our Supreme Court, in *Watson v. Harmon*, 85 Mo. 443, 1. c. 447, said:

"In actions for personal wrongs, such as personal injuries, slander, malicious prosecution, etc., it is rare that the courts will interfere with the verdicts of juries on account of the smallness of the damages awarded. [3 *Graham & Waterman on New Trials*, 1165; *Gregory v. Chambers*, 73 Mo. 294.] But in cases of breach of contracts and injury to property, which have fixed

standards of value or at least capable of estimation by direct proof, if there appears glaring deficiency in the verdict, justice demands a reversal. [Taunton Mfg. Co. v. Smith, 9 Pick. 11; Bagby v. Lewis, 2 Monroe, 76; Chambers v. Collier, 4 Geo. 193.]

“Nicholson v. Couch, 72 Mo. 209, was an action for conversion. The judgment was reversed because the damages assessed were excessive. Norron, J., observed: ‘The amount of the verdict for the plaintiff was, however, excessive, according to the highest estimates of the witnesses in regard to value, and the judgment must, therefore, be reversed, if reversible because the verdict is in excess of the ‘highest estimate of the witnesses in regard to value,’ logically and equitably the same result must follow where the verdict is so far below, as in this case, the lowest estimate of any of the witnesses (Fury v. Merriman, 45 Mo. 500.)”

Again, in Fisher v. St. Louis, 189 Mo. 567, 1. c. 578, 579, 88 S. W. 82, it is said: “But judges have never renounced their right, as an element in the administration of the law, to set aside a verdict, either excessive in bigness or ridiculous in littleness, where the result reached shocks the understanding and can not be fairly justified on any hypothesis except misconduct or prejudice or wilful disregard of instructions.” [See also Cole v. Armour, 154 Mo. 333, 55 S. W. 476.]

In Weisels-Gerhardt Real Estate Co. v. Pemberton Investment Co., 150 Mo. App. 626, 131 S. W. 353, we held that in an action on an express contract for a specified sum, the issue raised by the answer denying the contract was whether there was a contract, so that plaintiff, if entitled to recover, was entitled to recover the specified sum, and a verdict for less than the specified sum will be set aside on appeal by defendant, because it does not respond to the precise issue, for unless there was a contract for the full amount, no right of recovery existed. While not precisely in point here, this is in point as showing the control of appellate courts and of trial courts over verdicts. [See also Witty

v. Saling, 171 Mo. App. 574, 154 S. W. 421, and Morey v. Feltz, 187 Mo. App. 650, 173 S. W. 82.]

Learned counsel for appellant ask us to enter up judgment here for \$2000 and interest. We decline to do that. It is for the jury, or the court, if trial without a jury, to fix the amount of recovery in accordance with the evidence in the case.

The judgment is reversed and the cause remanded for further proceedings in accordance with the law as here indicated. *Allen and Becker, JJ.*, concur.

GORDON P. HENDERSON, Respondent, v. HEMAN
CONSTRUCTION COMPANY, a Corporation, Ap-
pellant.

St. Louis Court of Appeals. Argued and Submitted December 3, 1917.
Opinion Filed January 8, 1918.

1. **MASTER AND SERVANT: Injuries to Servant: Dangerous Machinery: Evidence: Question for Jury.** Evidence in an action for damages for personal injuries to plaintiff while working at a saw for defendant, examined, and *held* sufficient to take the case to the jury.
2. ———: ———: **Witnesses: Cross-Examination: Evidence: Competency.** In a personal injury case, plaintiff's witness, a deputy state factory inspector, testified that there were well-known safety appliances on the market with which the saw that caused plaintiff's injuries could have been guarded. The witness, on cross-examination, to show that he did not consider the saw, which was temporarily located, a manufacturing "establishment" requiring inspection, was asked why he had not inspected it. *Held*, that objection to the question was properly sustained.
3. ———: ———: **Instructions: Best Appliances "Possible."** An instruction telling the jury that if they found that a saw was so placed that it was dangerous to plaintiff while engaged in his ordinary duty as employed sawyer thereabout, or that at the time and prior to plaintiff's injury, if any, "it was possible for defendant to have safely and securely guarded said saw, but that defendant had failed and neglected to thus guard said saw," sufficiently meets the requirements of the statute, and to tell the jury that it must be so guarded as not to interfere with its operation was not necessary; the word "possible," as used, putting this issue before the jury.

4. **TRIAL PRACTICE: Instructions: Assumption of Facts: Request.** An instruction that if the jury found that while engaged in the duties of his employment working the saw, cutting pieces of lumber "which plaintiff was required to hold in position with his hands," etc., given under the general direction that if the jury found so and so to be the fact, does not assume that he had a right to hold in position with his hands the lumber he was sawing, and if certain elements were omitted, it was mere non-direction, and defendant cannot complain, inasmuch as no request was made for instructions covering such elements.
5. **NEGLIGENCE: Instructions: Measure of Damages.** An instruction in the usual form on the measure of damages for personal injuries, held not bad for failure to exclude any injuries caused by plaintiff's negligence.
6. ———: ———: **Assumption of Facts: Ordinary Care.** An instruction given at the instance of plaintiff in an action for personal injuries correctly defining ordinary care, and then charging that the omission of such care is negligence, etc., is not subject to the criticism that it is a mere abstract statement of law, leaving the jury to draw their own conclusions as to what degree of care defendant was bound to exercise, nor that it assumes the defendant was negligent.
7. **TRIAL PRACTICE: Instructions: Refusal.** The refusal of requested instructions covered by those given is not error.
8. **MASTER AND SERVANT: Injuries to Servant: Statutes: Construction.** Rev. St. of Mo. 1909, Sec. 7828, providing that machinery, etc., in manufacturing, mechanical, and other establishments, when so placed as to be dangerous to persons employed therein or thereabout, shall be safely guarded when possible, applies to a power-driven saw not in a building but temporarily placed and used in cutting lumber, since it is machinery used in a manufacturing and mechanical enterprise, comes within the meaning of the word "establishment," and whether it be permanently or temporarily placed is immaterial.
9. **DAMAGES: Personal Injuries: Excessive Damages.** A judgment for \$3500, considering the injury to plaintiff, he being permanently deprived of the use of his thumb and first finger, is not excessive, and the fact that he was intending to take up professional or skilled work rather than purely mechanical work did not make it excessive.

Appeal from the Circuit Court of the City of St. Louis.
—Hon. Leo S. Rassieur, Judge.

AFFIRMED.

Rodgers & Koerner for appellant.

(1) Section 7828, R. S. 1909, is in derogation of the common law, and, hence, should not be extended to cover either places or devices not clearly within the express terms. *Simpson v. Iron Co.*, 249 Mo. 400; *Phillips v. Shoe Co.*, 178 Mo. App. 196. (2) Defendant's peremptory instruction should have been given. Plaintiff's case does not come within the statute (Sec. 7828), because the saw by which he was injured was not in a "manufacturing," "mechanical" or other "establishment." Chapter 67, Arts. 5 and 6, R. S. 1909; *Ward v. City of Norton*, 86 Kans. 906; 3 Century Dictionary, page 2009; 3 Oxford Dictionary, page 298; Webster's Dictionary, page 751. In the construction of statutes two rules must be observed: (a) The language employed should be given its ordinarily accepted meaning. R. S. 1909, sec. 8057; *State ex rel. v. Gordon*, 266 Mo. 394, 411. (b) The language employed should be construed with regard to the context and in connection with all other statutes that are *in pari materia*. *State ex rel. v. Forest*, 177 Mo. App. 245; *In re Ryan's Estate*, 174 Mo. App. 202. (3) Instruction Number 1, given for plaintiff, is bad for the following reasons: (a) It assumes to enumerate the facts which, if found, entitle plaintiff to a verdict, but does not contain in its hypothesis all of the facts essential to the cause of action. *Miller v. Telephone Co.*, 141 Mo. App. 462, 475; *Enloe v. Am. Car & Foundry Co.*, 240 Mo. 443; *Grier v. Railroad*, 173 Mo. App. 276. An essential element of plaintiff's case was that the saw could be guarded without impairing its efficiency. *Phillips v. Hamilton-Brown Shoe Co.*, 178 Mo. App. 196, 213-214; *Cole v. Lead Co.*, 240 Mo. 397, 408; *Daniels v. Goepe*, 191 Mo. App. 1, 12. (b) It assumes as true a fact about which there is a controversy. *Clark v. Railroad*, 242 Mo. 570; *Moon v. Transit Co.*, 247 Mo. 227. (c) It uses words of uncertain meaning without definition. *Strother v. Street Ry.*, 183 S. W. 657; *Beggs v. Shelton*, 173 Mo. App. 127. (d) It places upon defendant the absolute duty to guard this machine, whereas this duty was subject to important

qualifications. *Phillips v. Shoe Co.*, 178 Mo. App. 196; *Saling v. American Chicle Co.*, 177 Mo. App. 374; *Strode v. Box Co.*, 124 Mo. App. 511; *Colliott v. Mfg. Co.*, 71 Mo. App. 170; *Meiffert v. Sand Co.*, 124 Mo. App. 491. (4) Plaintiff's instruction Number 2 is bad: (a) It permits the jury in determining plaintiff's damages to consider impaired earning capacity, of which there is no evidence. *Rosenkranz v. Railroad*, 108 Mo. 9, 16. (b) It does not limit the jury to such damages as they may find were caused plaintiff by defendant's negligence in the manner set forth in the petition. *Menhardt v. Ice, etc., Co.*, 163 Mo. App. 278; *Davis v. Street Rys.*, 188 Mo. App. 128, 143. (5) Plaintiff's instruction Number 3 is bad: (a) It assumes as fact that defendant failed to safely and securely guard the saw referred to in the evidence. (b) It uses the word "negligence" without definition. *Kieselhorst Piano Co. v. Porter*, 185 Mo. App. 684; *Raybourn v. Phillips*, 160 Mo. App. 534, 541, and cases there cited. (6) Defendant should have been permitted to show that the deputy factory inspector did not consider defendant's collection of implements to be an "establishment," and therefore made no inspection thereof. *Westermann v. Supreme Lodge*, 196 Mo. 709; *State ex rel. v. Job*, 205 Mo. 29. (7) The verdict is excessive. *Sanders v. Lumber Co.*, 187 Mo. App. 414, et seq. *Rittel v. Southern Iron Co.*, 127 Mo. App. 463, 468; *Parker v. Railroad*, 164 Mo. App. 31; *Huston v. Railroad*, 151 Mo. App. 335.

G. A. Orth, Joseph A. Wright and Watts, Gentry & Lee for respondent.

(1) The statute is not to be strictly construed but, being highly remedial in character, it should be liberally construed. *Austin v. Shoe Co.*, 176 Mo. App. 546. It has been expressly applied to a saw. *Holt v. Shoe Co.*, 186 Mo. App. 90; *Hughes v. Marshall Contracting Co.*, 176 S. W. 534. (2) The place where defendant was carrying on its work was an "establishment" within the meaning of the statute. *Casper v. Lewis*, 82 Kan. 604; *Bogard v. Tyler's Admr.*, 119 Ky. 637, 640; *Ohio, etc.,*

Ry. Co. v. Cavanaugh, 35 Ind. App. 32; Buchanan v. Blair, 90 Kan. 42; Murphy v. Bennett, 11 App. Div. 298. (3) Plaintiff's Instruction No. 1 correctly stated the law. Schultz v. Moon, 33 Mo. App. 34; LeMay v. Railroad, 105 Mo. 361; Browning v. Railroad, 124 Mo. 55, 71-72; Wilson v. Railroad, 160 Mo. App. 649, 667-668; Wheeler v. Bowles, 163 Mo. 398; Smith v. Fordyce, 190 Mo. 1, 31-32; Gamache v. Johnson Tinfoil & Metal Co., 116 Mo. App. 596; The State to use v. Donnelly, 9 Mo. App. 519. This is true, even as to indictments: State v. Maclay, 180 Mo. App. 727; State v. Hilton, 248 Mo. 530; State v. Becker, 248 Mo. 555. (a) The instruction does not assume any fact about which there is a controversy. (b) The word "establishment," used in the instruction, is not a word of uncertain meaning. It is a word of everyday use. It was not error to fail to define such a commonplace word. Anderson v. Sash & Door Co., 182 S. W. 819; Richmond v. U. Rys. Co., 176 Mo. App. 330; Mather v. Railroad, 166 Mo. App. 142, 148-149; Sweeney v. Railroad, 150 Mo. 385; Morris v. Railroad, 184 Mo. App. 65; Gillogey v. Railroad, 187 Mo. App. 551; Bettoki v. Mining Co., 180 S. W. 1021; Sanders v. Quercus Lbr. Co., 187 Mo. App. 408; Casey v. Barber Asphalt Pav. Co., 202 Fed. 1. (c) If defendant desired any definition of the word "establishment," it should have submitted an instruction defining it. (d) The defendant framed its instructions on the same theory as that of plaintiff; therefore, it cannot now complain of plaintiff's instruction. Wilson v. Railroad, 160 Mo. App. 649, 665. (4) Plaintiff's Instruction No. 2 correctly declared the law. Rittel v. Souther Iron Co., 127 Mo. App. 463, 467. (5) There was no error in sustaining plaintiff's objection to defendant's offer to show by the factory inspector what he thought the law meant. Howell v. Sherwood, 242 Mo. 513; Williams v. City of St. Joseph, 243 Mo. 224; Whiteaker v. Railroad, 252 Mo. 438. To allow a witness to express an opinion of what the law means would be improper. Ellis v. Brand, 176 Mo. App. 390-391; Watkins, etc., Co. v. Holloway, 181 S. W. 603; Iowa Portland Cement Co.

v. Lamandola, 227 Fed. 823, 827. (6) The verdict of the jury was not excessive in the first instance, and since the trial court required a remittitur of \$1000, the amount of the judgment as it now stands is extremely moderate. Saller v. Friedman Bros. Shoe Co., 130 Mo. App. 712. The whole of Henderson's thumb and the whole of his index finger on his left hand were lost, which was a much more serious loss than the loss of index finger and half of one joint of thumb, as in the case of Rittel v. Souther Iron Co., 127 Mo. App. 463, 466.

REYNOLDS, P. J.—Plaintiff, then a young man about twenty years of age, attaining his majority December 24, 1914, was a student in the agricultural department of the State University located at Columbia, Missouri, specializing in the marketing of rural products. In the summer of 1914, and during the vacation of the college, he went to work with defendant, engaged in constructing a concrete viaduct at the intersection of Jefferson and Chouteau Avenues, in the city of St. Louis, across the tracks of several railways. He was put to work assisting in the sawing of lumber, that being done by a circular or rip saw. Plaintiff's particular work at first was to put the lumber on rollers that ran up to the saw and take it off after the saw had passed through it. He had had no previous experience in this work and after doing this work for two weeks under the direction of a foreman, was put to running the saw by the carpenter foreman of defendant. Before putting him at this work the foreman asked him if he knew how to run the saw. Plaintiff said, "Yes." Whereupon the foreman told him that he was to run it. Defendant, in connection with its work of constructing the viaduct, was engaged in sawing lumber of all kinds, ripping pieces, sawing wedges, and the like. The saw was set on a table, a frame with an iron top and a slit in it for the saw to run in. There was a motor supplying the power and a belt connected with a shaft, which ran underneath the table, the saw being on a shaft running through a slit in the table. The platform of

this table was about waist high, about five feet long and three feet wide. The saw being operated at the time was a fourteen-inch saw and was set lengthwise of the table. Over the saw was an iron hood, about an inch wide, set over the top, and a thin "splitter," as it is called, which was a piece of steel the thickness of the saw and let down into the groove made by the saw as it cut through the board. The end of the guard or hood over the top of the saw was about five and a quarter inches from the top of the table at the end towards the operator, said the plaintiff, this hood remaining in the same position while the saw was moving, but it could be raised or lowered upon occasion when it was necessary to put in a larger saw or thicker board. It was held in place by means of a thumbscrew set under the table, and could be raised or lowered above the top of the table. The accident to plaintiff occurred about half past nine o'clock on the morning of August 13, 1914. Plaintiff was sawing wedges out of a yellow pine board about eighteen inches long which another employee had brought him. The board had been marked off for three wedges and he was sawing them out. These wedges were to be used in bracing a gravel bin of the defendant. Plaintiff had sawed out one of the wedges and started to saw out another. The board was resting on the table through which the saw ran, and plaintiff was pushing it in towards the saw with his left hand and holding it down with his right hand. He had sawed half way the length of this second wedge when the board split or the saw struck a rotten place and jumped, jerking his hand into the saw and cutting his thumb and first finger so that it was necessary to amputate them down to the first joints, the saw having cut though the first and second joints and the ends hanging by flesh or skin. The wound did not heal until the middle of October. Since the accident the fingers of the hand are very sensitive and if plaintiff happens to strike them against anything it is very painful. While working for defendant plaintiff received \$2 a day. After being injured he

went home and then to a hospital and did not work any more that summer; was at the hospital five days.

The defendant had hoisting engines and concrete mixers in the vicinity of the saw at the time of this accident and an office building, these being used in carrying on the work of constructing the viaduct. There was no machinery in the office and neither the saw nor any of the other appliances were in any building or enclosure. The saw by which plaintiff was injured was out in the open—no roof over it. It was what is called a portable saw; could be moved and was moved from place to place as the work required, and no building or enclosure over the machinery except that there was a roof over a hoisting machine—a temporary shelter. One of the concrete mixers was moved as occasion required. All the machinery was there temporarily and for the purpose of doing that particular work and then moved away.

On cross-examination plaintiff said that he worked for defendant from July 16th until the first of August and had seen the operation of this saw every day; saw how lumber was put through there; knew that the guard over the saw could be lowered or raised by using the thumbscrew on the under side of the table, and knew that the slot was there for the purpose of raising and lowering that guard; sometimes used the twelve inch saw and sometimes a fourteen-inch, replacing one for the other as occasion required, and when doing that, raising or lowering the guard; had seen this done but had never done it himself. The purpose of moving the splitter was for so adjusting it as to try and cover the front of the saw so that the teeth of the saw would not cut on the inside of the guard and get hot. He understood the operation of the machinery about the saw and understood how to start and stop the saw and had never made any complaint about the guard. On the occasion of the accident plaintiff pushed with his right hand and held the board down with his left, he repeated. This was to bring the board in contact with the teeth of the saw, holding the board on the table

with his left hand, holding it down to keep it from flying off the table or from vibration, and he repeated that on the occasion of the accident he was holding the board down with his right hand and pushing with his left; that he was pushing the board and it was half way through when the board jumped forward; had his thumb on the west end of the board pushing on that end; his index finger next to it. (It appears that there was a model or diagram identified as showing the board as marked and as being sawed, which was before the jury for their inspection, and plaintiff testified, illustrating from that diagram or model. Photographs were also used at the trial.) When the board jumped, the distance between the little finger of his left hand and the saw, plaintiff thought, was eight or ten inches. His thumb and index finger were closer. No other parts of his hand, except his thumb and first finger, were hurt.

A witness for the plaintiff, who was a deputy state factory inspector, shown photographs of the saw, was asked if there was in use and on the market any sort of safety appliance in the way of a guard that could have been put over that table so as to guard the saw without interfering with the work and so as to cover the entire surface of the saw and protect the hand of the operator. This was objected to by counsel for defendant and the objection overruled, exception saved and witness answered that there was, and described the kind of guards that were in use for that purpose and had been extensively advertised and were generally known. These guards are made 'so that they will fit over the saw, are made of steel and witness described them. They can be used on a portable saw, such as the one in question, and he testified that they can be readily adjusted so as not to interfere with the work of the saw. (It was not claimed that any such guards were in use on the saw, the only guard being the hood we have referred to.)

On cross-examination counsel for defendant asked this witness why he had not gone to the place where defendant was operating and make an inspection. This was objected to and the objection sustained.

This was practically the testimony for plaintiff.

Averring the fact of the injury, the petition charges that the saw as placed and in operation was dangerous to plaintiff and that it was possible for defendant to have safely and securely guarded it, and that the failure of the defendant company to install and maintain a proper guard for the saw was in direct contravention of the provisions of section 7828, Revised Statutes 1909, setting out that section, and that while he was operating the saw his left hand was thrust into and upon the same and came in contact with it and the thumb and index finger so cut, mangled and mutilated as to necessitate their amputation, and that plaintiff's hand was thrust into and came in contact with the saw by reason of the carelessness and negligence of the defendant in failing to guard the saw as required by that section of the statute. Averring that his injuries were serious and permanent he prayed judgment for \$4500.

Defendant introduced evidence seeking to prove the averments of its answer, which, after a general denial, pleads contributory negligence and also avers "that at all the times mentioned in plaintiff's second amended petition filed herein, defendant provided and equipped the circular or rip saw described in said petition with a safe, suitable and adequate guard, which said guard could at all said times be raised and lowered by plaintiff, according to the thickness of the material being sawed by plaintiff and so that said material could be sawed and at the same time afford protection to plaintiff from coming in contact with said saw," and charges that plaintiff had negligently failed to avail himself of the guard and carelessly allowed and permitted his thumb and the index finger of his left hand to come in contact with and against the saw and that these acts of negligence on the part of plaintiff directly contributed to cause whatever injuries, if any, were sustained by him on the occasion.

To this plaintiff replied, and on trial before the court and jury, a verdict was returned in favor of

plaintiff in the sum of \$4500. Defendant, filing a motion for new trial and in arrest of judgment, the court announced that it would sustain the motion for new trial unless plaintiff remitted \$1000 from the verdict. A remittitur was entered, the motions for new trial and in arrest overruled, and judgment rendered in favor of plaintiff in the sum of \$3500, from which defendant duly perfected its appeal.

There are just two material questions involved in this case. First, was this machinery, more particularly the saw, situated as it was, machinery which came under the provisions of section 7828? Second, assuming that it did come under the provisions of that section, was it properly guarded? Other minor points are made which we will notice briefly.

Learned counsel for appellant make a number of assignments of error, claiming error in refusing to take the case from the jury at the close of plaintiff's evidence and again at the close of the whole case; error in excluding testimony sought to be brought out from the deputy factory inspector referred to; error in giving certain instructions to the jury at the instance of plaintiff and in refusing to give certain instructions asked by the defendant; error in overruling the motion for new trial and in failing to require plaintiff to remit a larger sum than \$1000.

Disposing of these assignments, we do not find any of them tenable.

Reading the evidence introduced in behalf of plaintiff, we hold that it was sufficient to take the case to the jury.

We find no error in declining to allow the deputy factory inspector to state why he had not made an inspection of the machinery in operation by the defendant and used in the construction of the viaduct. The object stated by learned counsel for appellant in asking this question was a desire to show that this was not a manufacturing establishment and that the witness, as a deputy

factory inspector for the State, did not consider it a manufacturing establishment and knew that it was not a manufacturing establishment and for that reason did not go there. It is true that it is a recognized rule of interpretation of statutes that where they have been interpreted by the executive officers, whose duty it is to enforce them and their construction has been acted upon for any considerable time, due regard should be paid to such construction. That is the rule announced in *Endlich on Interpretation of Statutes*, sec. 83, and quoted approvingly by our Supreme Court in *Westerman v. Supreme Lodge Knights of Pythias*, 196 Mo. 670, 1. c. 709, 94 S. W. 470. That same rule has been announced by our Supreme Court in *Ross v. Kansas City, St. J. & C. B. Ry. Co.*, 111 Mo. 18, 1. c. 25, 19 S. W. 541. But that is very far from sustaining the proposition made by learned counsel for appellant that it was competent for this deputy state factory inspector to testify as to why he had not inspected this particular machinery because he thought it did not fall within the duties of his office as being machinery which he was required to inspect. That testimony was properly excluded.

It is complained of the first instruction given at the instance of plaintiff that it omits reference to necessary facts to entitle plaintiff to recover. We do not think that this instruction omits reference to any element essential to plaintiff's right of recovery. It followed the language of the statute, but does omit to reckon with the construction placed on the statute by our courts, namely, that the machinery should be safely and securely guarded when possible "without seriously impairing its efficiency." We do not find this objection tenable. This instruction distinctly told the jury that if they found from the evidence "that said saw was so placed that it was then and there dangerous to plaintiff while he was engaged in his ordinary duties as such employee, and while he was working as a sawyer thereabout, and that on said day and at the time of and prior to plaintiff's receiving his injury, if any, it was possible for

defendant to have safely and securely guarded said saw, but that defendant had failed and neglected to thus guard said saw," etc. We think this sufficiently meets the requirements of the statute and it was not necessary for the court to tell the jury that it must be so guarded as not to interfere with its operation. The word "possible," as used in this instruction was all that was required to put this issue properly before the jury.

Another error assigned against this instruction is that it assumes as a fact that plaintiff was required to hold in position with his hands the lumber he was sawing. We do not understand the instruction to carry any such inference. In that part of it so criticized the jury is told that if it is found that while plaintiff was engaged in the duties of his employment in his customary working place in the establishment and was working at the saw and cutting pieces of lumber "which plaintiff was required to hold in position with his hands, a piece of wood which he was then and there sawing suddenly and violently plunged forward and thereby plaintiff's left hand was caused to come in contact with said saw and his thumb and index finger of his left hand were caught in said saw and mutilated so that it was necessary to amputate the same," etc. All this was under the general direction that if the jury found so and so to be the fact, and is very far from assuming that he had a right to hold his hands in that position. It is very correctly argued that the statute is not intended to make the employer an insurer, and that the duty to guard attaches only when the normal operation of the machine threatens injury to the employee. All of these elements, it is claimed, are omitted from this instruction. If so, failure to so instruct was mere non-direction, and we find no request for any such instruction. Briefly, we find no error in this first instruction.

Instruction No. 2 is on the measure of damages and is criticized for failure to exclude any injuries caused by plaintiff's negligence. We do not think that was necessary. The instruction is in the form generally adopted as the correct basis for damages in like cases.

Instruction No. 3, given at the instance of plaintiff, is said to be subject to serious criticism in that it is a mere abstract statement of law, leaving the jury to draw their own conclusion as to what degree of care defendant was bound to exercise. It is further objected to as not defining negligence and that it assumes as a fact that defendant failed to safely and securely guard the saw, the latter a very much controverted issue, defendant contending that the latter was sufficiently guarded under the circumstances. In an instruction which the court gave at the instance of plaintiff the court defined ordinary care correctly and then charged that the omission of such care is negligence in the sense in which that word is used in the instructions. We see no error in this third instruction.

Nor do we find any error in the court's action in refusing instructions asked by defendant. They were either covered by instructions given or did not properly present the issues to the jury.

The most serious contention, however, is that this saw, as placed and used, was not within the terms of section 7828. It is true that it was not in a building, but as we have said in *Austin v. Bluff City Shoe Co.*, 176 Mo. App. 546, 158 S. W. 709, and as has been held in many cases following that and in the cases there referred to as decided by our Supreme Court, the statute is highly remedial, and although it changes the common law, it is to be liberally construed in favor of the safety of the life and limbs of employees. That was the object had in view. When our statute provides, as it does, that "The belting, shafting, machines, machinery, gearing and drums, in all manufacturing, mechanical and other establishments in this State, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible," as we view it, it covers all such appliances used in and about all manufacturing, mechanical and other establishments. This defendant was undoubtedly engaged in a branch of manufacturing or mechanical work and its appliances used

were as much included within this law as if they had been housed and covered up and all under roof. It was engaged in a manufacturing and mechanical enterprise requiring the use of machinery. While its working plant was not under cover or in a building, its plant, as located and used, was "established," whether temporarily or permanently is immaterial, at a certain place to carry on certain work, in the doing of which machinery was used, and all of the machinery so used was of the "establishment." That being so, it was within the law. Hence defendant owed the duty to its employees to safely and securely guard all these appliances when possible, or if not possible to so guard them then to give notice of its danger by posting a warning in the establishment. There is no pretense that the latter was done. By its answer in this case, the part germane to this being quoted by us above, defendant pleaded that this particular machine, this saw, was properly guarded. In point of fact its whole defense was directed to the proposition of attempting to prove that it had properly guarded this saw. No such plea was proper save in a case within the statute. The proposition submitted to the jury was as to whether this saw could have been and was properly guarded, and the jury found against defendant on the evidence. We are not disposed to disturb that verdict.

The amount of the verdict, even as reduced, is attacked as excessive. We are unable to agree to this.

In the first place, that was a matter so largely in the discretion of the trial court, and which it exercised in reducing the amount found by the jury and requiring a remittitur of \$1000 of the \$4500, which the jury returned, that we do not feel warranted in interfering. Nor, in the next place, are we prepared to say that the amount finally allowed to stand as a verdict, \$3500, considering the injury to plaintiff, he being permanently deprived of the use of his thumb and first finger, is excessive. Learned counsel for the defendant claim that plaintiff's testimony showed that he did not intend engaging in any purely mechanical work where the use of his thumb and first finger on his left hand would be necessary but that

he was in what might be called professional or skilled work. Who can say that the plaintiff, a young man just entering on his majority, would, through the course of his natural life, at no time be put into such circumstances as to render it necessary for him to resort to manual work of some kind. No matter what his expectations as to his future career may be, whether manual or professional, he is entitled to the use of all of his members with which he was endowed, and deprivation of the use of two such important ones as here appears, surely goes to the impairment of his efficiency, comfort and enjoyment of life.

We find no reversible error to the prejudice of defendant.

The judgment of the circuit court is affirmed. *Allen* and *Becker, JJ.*, concur.

HYDRAULIC PRESS BRICK COMPANY, Respondent, v. CHARLES E. LANE, MONROE CONSTRUCTION COMPANY, FRED W. LOVETTE, ST. LOUIS LUMBER COMPANY, LACLEDE TRUST COMPANY, et al., Defendants, LACLEDE TRUST COMPANY, Appellant.

St. Louis Court of Appeals. Submitted on Briefs December 3, 1917.
Opinion Filed January 8, 1918.

1. **APPELLATE PRACTICE:** Judgments: Final Judgment. A judgment that substantially follows the provisions of section 8235a, Laws of 1911, p. 314, adjudging, in the same suit, the rights of the parties having mechanics' liens, and directing the sheriff to hold the proceeds of the sale subject to the order of the court, the court retaining jurisdiction for the purpose of making "such further orders and decrees as may be proper," held a final judgment from which an appeal would lie; a judgment being final for purposes of appeal, although some incidental judgment or dependent matter may remain for adjustment, or further proceedings may be contemplated and necessary in the execution of the judgment, order, or decree.

2. **MECHANICS' LIENS: Proceedings Constituting Commencement of Action: Filing Petition: Process.** Where a petition in a suit to enforce a mechanic's lien was filed at the October term and within 90 days after the filing of plaintiff's lien, the suit was begun within 90 days as to defendants served by publication, although the order of publication was not made or published until the December term following, at which term the summons was returnable, in view of Rev. St. of Mo. 1909, section 1756, providing that the filing of a petition shall be taken and deemed the commencement of the action.
3. ———: **Trial Practice: Prosecution of Action: Unreasonable Delay.** Where plaintiff's petition in a mechanic's lien suit was filed at the October term, returnable to the December term, when order of publication was made, which was returnable to February term, replies filed at the same term, and case heard at June term, it cannot be said that there was an unreasonable delay on plaintiff's part in proceeding with the case; there being no application made by any party or order of court under section 8235a, Laws 1911, p. 316, speeding up the action.
4. ———: ———: **Publication by Defendant: Necessity.** Where, in a suit to enforce a mechanic's lien, plaintiff's service by publication was timely, it was unnecessary for a defendant, filing an answer and seeking to enforce its own lien, to sue out an order for publication, since that sued out by plaintiff was sufficient for the whole case.

Appeal from the Circuit Court of the City of St. Louis.—
Hon. Wm. M. Kinsey, Judge.

AFFIRMED.

Henry H. Oberschelp for appellant.

(1) (a) The only service in the suit as to the holder of the first deed of trust on the other lot and building was by publication, and the suit could not be deemed commenced as to such holder until plaintiff had done all it could do to secure, and make and complete such service by application. Sec. 1756, R. S. 1909; *South Missouri Lumber Co. v. Wright*, 114 Mo. 326, 333, 334; *White v. Reed*, 60 Mo. App. 380, 386, 387; *State ex rel. v. Broadus*, 245 Mo. 137; *Pitkin v. Flagg*, 198 Mo. 646, 651; Secs. 1776 and 1777, R. S. 1909; 1. C. J. 1159; 1. Cyc. 750. (b) The suit was not commenced as to such holder within ninety days after the filing of plaintiff's alleged

mechanics' lien, and therefor did not bind such holder of the first deed of trust and the interest it held in lot 23 and building thereon. Sec. 8228, R. S. 1909; *Riverside Lumber Co. v. Schafer*, 251 Mo. 539, 551, 552; *Hiller v. Schulte*, 184 Mo. App. 42, 46; *Anheuser-Busch Brewing Assn. v. South. Bowling Assn.*, 134 Mo. App. 312. (c) As such lien failed to bind such holder and the first deed of trust and interest it held in lot 23 and its building, being an alleged blanket lien, seeking to bind all, it also failed to bind the Laclede Trust Company and the first deeds of trust and the interests it held in the lots 22 and 24 and the building thereon. *Hiller v. Schulte*, 184 Mo. App. 42, 49. (d) Besides there was unnecessary delay by plaintiff in the prosecution of its suit for mechanics' lien, which was fatal. Sec. 8228, R. S. 1909. (2) (a) There was no service by publication or otherwise on the holder of first deed of trust on lot 23 as to the Lumber Company's answer and intervening petition and prosecution of its claim, and therefore its lien did not bind such. *Marshall v. Reddick*, 177 S. W. 381; *Jones v. Alf. Bennett Lbr. Co.*, 175 Mo. App. 26; *State ex rel. Coleman v. Blair*, 245 Mo. 680; *Harness v. Cravens*, 126 Mo. 233; *Otis v. Epperson*, 88 Mo. 131; *Woodruff v. Bunker Cullen Lbr. Co.*, 242 Mo. 381; *Kunzi v. Hickman*, 243 Mo. 103, 113, 114; *Parker v. Benton*, 172 Mo. 85; 32 Cyc. 481, 483. (b) Even if the publication by plaintiff be regarded as being a service and commencement in favor of the Lumber Company as to the prosecution of its alleged lien, yet such publication was not had and completed within ninety days after the filing of its lien and therefore failed as to such other holder. See cases cited under Point 1 (a) and (b). (c) Therefore, as said Lumber Company also sought one blanket lien against all, failing as to such other, it also failed as to the Trust Company and the first deeds of trust and interest it held in lots 22 and 24 and buildings thereon. *Hiller v. Schulte*, 184 Mo. App. 42, 49. (3) If the Trust Company be required to pay any or all of the claims to protect its interests, the court should have granted it relief and not sacrifice its interests for

what went into the other building in which it had no interest.

Eliot, Chaplin, Blayney & Bedal and McLaran & Garesche for respondents.

(1) (a) Respondents commenced suit against the unknown holder of the deed of trust on lot 23 within ninety days after they had filed their respective liens. Secs. 1756, 8220, 8221, 8228, R. S. 1909. *McGrath v. Railroad*, 128 Mo. 1, 8 and 9; *S. Mo. Lbr. Co. v. Wright*, 114 Mo. 326, 334; *Moore v. Ruxlow*, 83 Mo. App. 51; *Gosline v. Thompson*, 61 Mo. 471; *State ex rel. v. Broadbudd*, 245 Mo. 123, 137; *Riverside Lumber Co. v. Schafer*, 251 Mo. 539, 552; 1 *Corpus Juris*, 1158; *Badger Lumber Co. v. Staley*, 141 Mo. App. 295, 298; *Matthews v. Stephenson*, 172 Mo. App. 220, 228; *Weis Cornice Co. v. Neevel & Sons*, 187 Mo. App. 496. (b) Even if the unknown holder of the deed of trust on lot 23 was made a party defendant after ninety days, this was sufficient. *American Radiator Co. v. Connor Co.*, 184 S. W. 907. (c) The holder of the deed of trust on lot 23, being unknown to respondents, its interest not being disclosed of record, is bound by having its assignor, Lovett, a party to the suit, since respondents' liens are superior to the deed of trust. Sec. 8235-B, R. S. 1911, page 315; *Redlon v. Badger Lumber Co.*, 194 Mo. App. 650. (2) It was unnecessary for respondent, *St. Louis Lumber Company*, to obtain a separate order of publication. The order of publication of the respondent, *Hydraulic Press Brick Company*, brought the parties affected by the order into court for the purpose of having the *Lumber Company's* lien enforced against them. Secs. 8235-E, Laws 1911, page 316; Sec. 8235-D, Laws 1911, page 315; Sec. 1776, R. S. 1909. (3) (a) Even though the unknown holder of deed of trust on lot 23 was not a party to the suit, or is not bound by the decree, still the appellant's interest in lots 22 and 24 is bound. Sec. 8221, R. S. 1909; *Badger Lumber Co. v. Ballentine*, 54 Mo. App. 172; *Riverside Lumber Co. v. Schafer*, 251 Mo. 539, 552; *Miller Lumber Co. v. Oliver*,

65 Mo. App. 435; *Bulger v. Robertson*, 50 Mo. App. 499; *Brown v. Wright*, 25 Mo. App. 54; *Kneisley Lumber Co. v. Stoddard Co.*, 113 Mo. App. 306; *Fire Door Co. v. Viviano*, 194 Mo. App. 440; *Brockett Co. v. Logan*, 187 Mo. App. 322; *Ind. Sash Door Co. v. Bradfield*, 153 Mo. App. 527. (b) The liens filed by respondents did not have to apportion the material. *Sec. 8237, R. S. 1909*; *Lumber Co. v. Roeder*, 81 Mo. App. 337; *Bickel v. Roeder*, 81 Mo. App. 653; *Walden v. Robertson*, 120 Mo. 38. (c) This case is not similar to that of *Hiller v. Schulte*. *Hiller v. Schulte*, 184 Mo. App. 42; *Bolen Coal Co. v. Ryan*, 48 Mo. App. 512; *Mo. Lbr. Co. v. Sedalia*, 78 Mo. App. 230. (d) Appellant asked for no relief in its answer as against the Union Station Bank and cannot now make that an issue in this case. *Coen v. Hoffman*, 188 Mo. App. 314. (4) The respondents prosecuted the suit with due diligence. *Nicol Heating & Plumbing Co. v. Neevel*, 187 Mo. App. 584, 586.

STATEMENT. This is an action brought to enforce a mechanic's or materialman's lien on lots 22, 23 and 24 of Marcus Avenue Heights, in city block 4391B in the city of St. Louis, it being averred that they are the same property theretofore conveyed by deed from Eva L. Wertz to Monroe Construction Company, dated February 4, 1914, and recorded February 4, 1914. The defendants named in the petition are Charles E. Lane and Lora B. Lane, his wife, Eva L. Wertz, the Monroe Construction Company, Richard F. Goodnow, trustee, Fred W. Lovett, Laclede Trust Company, St. Louis Lumber Company, Isaac R. Goldberg, doing business as Isaac R. Goldberg & Company, and "the Unknown Consorts, Heirs, Devisees, Donees, Alienees, or Immediate or remote, voluntary or involuntary grantees or Fred W. Lovett." Setting out that plaintiff, on January 29, 1914, has entered into a contract with the Monroe Construction Company, whereby it agreed to furnish to that company certain brick for three one-story buildings to be known as numbers 4866, 4868 and 4870, Carter Avenue in the city of St. Louis, situate on premises which are described

as above, it is averred that the buildings are erected on contiguous lots. It is further averred that at the time of making the contract with the Monroe Construction Company, the legal title to the above described premises was in Charles E. Lane and that on February 3, 1914, Lane and his wife transferred the property to defendant Eva L. Wertz by deed duly recorded, and on February 4th, Eva L. Wertz transferred the property to the defendant Monroe Construction Company. Averring that plaintiff is unable to state whether at the time it entered into its contract with the Monroe Construction Company, that company was the general contractor for the erection of the building under contract with Charles E. Lane, the then owner, or with the defendant Eva L. Wertz, who afterwards became the owner, or whether the Monroe Construction Company was the equitable owner of the property at the time, plaintiff declares its belief of one alternative or the other and its ignorance as to whether it be the one or the other. It is then averred that commencing February 12, 1914, and ending March 24, 1914, plaintiff continuously furnished to the Monroe Construction Company under its contract, brick to the value of \$563.30 for the three buildings described and that this material was furnished for and actually entered into the construction of the three one-story brick buildings, the particulars appearing in the account filed, which sets out the items and dates. The petition then makes the necessary averments as to filing the lien claim in the proper office, the latter being done July 24, 1914. As there is no question made as to the lien account, its correctness and filing, it is not necessary to further particularize it. It claimed a balance due and unpaid of \$327.15 for which plaintiff claims a lien against the contiguous lots as described and the three buildings thereon. It is further averred that on September 23, 1914, the defendant St. Louis Lumber Company filed in the circuit court of the city of St. Louis its lien against the property herein described in the sum of \$72.14; that on October 2, 1914, the defendant Goldberg filed with the same officer his lien against the property described, in the sum

of \$575.69. The petition further sets out that the defendants Goodnow, trustee, and Lovett claim some interest in the property and improvements under certain deeds of trust, all dated February 4, 1914, executed by the Monroe Construction Company to Richard F. Goodnow, trustee for Fred W. Lovett, the first deed of trust on each lot securing one principal note for \$1650, due three years after date, with six semiannual interest notes each for \$49.50, the second securing twenty-six notes for \$25 each and one for \$200, the first note due four months from date and one note due each month thereafter, totalling \$850, which deeds of trust, it is averred, were filed for record in the office of the Recorder of Deeds of the city of St. Louis at dates set out, not now material. It is further averred that the defendant Laclede Trust Company at one time claimed to own certain of the notes secured by certain of the deeds of trust mentioned but plaintiff, it is averred, is ignorant whether that Trust Company still owns the same, wherefore that Trust Company is made a defendant to the suit. On information and belief, it is averred that Fred W. Lovett and the Monroe Construction Company are not now the present owners or holders of the notes secured by the deeds of trust heretofore set out and plaintiff therefore states that they are and that it verily believes that there are persons interested or who claim to be interested in the subject-matter of the petition and the real estate hereinbefore described, whose names cannot be inserted herein because they are unknown to it and that such unknown persons derive or claim to derive their titles or claims as consorts, heirs, devisees, donees, alienees or immediate, mesne or remote, voluntary or involuntary grantees of Fred W. Lovett and the Monroe Construction Company; that Fred W. Lovett, the Monroe Construction Company, and defendant Laclede Trust Company, were the last persons known to plaintiff to have an interest in the property by virtue of the deeds of trust hereinbefore set forth, and that said unknown persons derive or claim to derive their titles or claims as consorts, etc., or voluntary or involuntary gran-

tees of Lovett and the Monroe Construction Company and the Laclede Trust Company by virtue of the note secured by the deeds of trust before set out. Plaintiff therefore prays that an order of publication issue for the unknown consorts, etc., grantees of the defendants Lovett, the Monroe Construction Company and Laclede Trust Company; that it have judgment against the defendant Monroe Construction Company for the sum of \$327.15, with interest thereon at the rate of six per cent. per annum from April 1, 1914, and for costs, and a special judgment and decree binding and subjecting the premises described, being contiguous lots of ground, and the improvements thereon, to and for the payment of plaintiff's judgment, with interest and costs of suit and that the court determine, establish and enforce the various and respective rights of the parties to this suit and in case of sale of the property, that the court equally distribute the proceeds thereof; that if there are other persons interested in the subject-matter of the suit they be allowed to intervene as parties plaintiff or defendant, and for such other and further orders as may be meet and proper.

This petition was duly verified and it was filed on October 5, 1914, in the office of the clerk of the circuit court of the city of St. Louis.

The attached statement of account referred to in the petition shows the dates of delivery of various grades of brick to the Monroe Construction Company for use in the three houses described in the petition, no attempt being made to apportion the brick for each house, but the account being stated as one account against all three.

The petition, as stated, was filed on October 5, 1914. That being the first day of the October term of the court, the summons was returnable to the first day of the succeeding term, which would be December 7, 1914. On that date an answer and intervening petition for the enforcement of a mechanics' lien was filed by the Glencoe Lime & Cement Company which was afterwards withdrawn, and on the same day an answer was filed by the St. Louis Lumber Company. This latter substan-

tially follows the allegations of the petition as to the notes and deed of trust and unknown ownership of the note, and sets out that a claim of a lien for \$72.14 was duly filed by the St. Louis Lumber Company on September 23, 1914. The lots are described as in the petition. On December 9, 1914, an order of publication was sued out by plaintiff and ordered to be issued and was issued on December 10th against all the named defendants and "the unknown consorts, heirs, grantees," etc., of Fred W. Lovett. The order is in unusual form and sets out that it appeared by the petition that there are unknown persons interested or claiming to be interested in the property, deriving title through Fred W. Lovett by virtue of the deeds and deeds of trust set out in the petition, describing them, and that plaintiff claims a lien for \$327.15, the St. Louis Lumber Company for \$72.14, and Goldberg for \$579.99, and the unknown consorts, etc., claiming under Lovett, are ordered to appear in court at the February, 1915, term and answer, etc. It was first published December 17, 1914, its last publication being on January 7, 1915. Proof of publication was filed February 11, 1915.

On December 16, 1914, the Laclede Trust Company filed its answer, afterwards filing an amended answer on February 25, 1915, to plaintiff's petition and to the intervening petition of the St. Louis Lumber Company, and on April 9, 1915, the Laclede Trust Company was granted fifteen days further time to plead. On April 24, 1915, it filed its second amended answer.

In this second amended answer the Laclede Trust Company, denying each and every allegation in the petition, by way of cross-bill, sets up that on February 4, 1914, the Monroe Construction Company was the owner of the lots described and executed the first three deeds of trust set out in the petition on each of the respective three lots; that immediately upon the execution of these deeds and their execution and delivery, Lovett indorsed all of the notes secured by the deeds of trust without recourse, and immediately transferred the notes and deeds of trust and had never had any interest in any

of them since February 4th; that it (the defendant Laclede Trust Company) became the owner and holder for value of the first two deeds of trust on lots 22 and 24, together with the buildings and improvements thereon, and default having been made in each, the deeds of trust held by the defendant Laclede Trust Company were duly foreclosed by the successor in trust of Goodnow, and that the defendant Laclede Trust Company became the purchaser and received deeds from the trustees for both of the lots and improvements thereon, each dated November 14, 1914, the date of the sales, and duly recorded November 16th of that year, and it is averred that it, the defendant Laclede Trust Company, is now the absolute owner of both lots 22 and 24 and the buildings and improvements thereon; that the holder of the deed of trust on lot 23, at the time of its transfer by Lovett on February 4th, and at the time of the erection of the buildings and improvements on lots 22, 23 and 24, and at the time of the filing of the alleged mechanics' liens against all said lots and the buildings and improvements thereon and at the time of the bringing of this suit by plaintiff and at all times since its transfer by Lovett was never made a party to this suit, "unless such holder be considered as one of the parties included in the order of publication made by this court on December 9, 1914, at the request of plaintiff." - What became of the notes to Lovett secured by the second deed of trust is not stated.

It is further averred that plaintiff and the other alleged mechanics' lien claimants deliberately, without cause, unnecessarily delayed the prosecution of this suit and of the proceedings to establish their said alleged mechanics' liens against the holder of said deed of trust on lot 23, and deliberately and unnecessarily delayed for more than ninety days after the filing of each of the alleged mechanics' liens by plaintiff and defendants until December 9, 1914, to sue out an order of publication, when plaintiff in this cause moved this court to make said order of publication as to unknown consorts, etc., returnable to the February term, 1915, of this court,

and although the clerk of this court made out a certified copy of this order of publication the following day, yet none of the alleged mechanics' lien claimants, plaintiffs or defendants, did anything towards publishing said order or proceeding against said unknown consorts, etc., named and referred to in said order until December 17, 1914, when occurred the first publication in a newspaper of said order."

It is further averred in this second amended answer of the Laclede Trust Company that default had also been made in the deed of trust which was on lot 23 and the holder of that deed of trust was in the same position with reference thereto as this defendant Laclede Trust Company was with reference to lots 22 and 24, and became practically the real owner of said lot 23 and the buildings and improvements thereon, and it is averred that accordingly, "as this suit and the proceedings thereunder were not begun as to said holder of said deed of trust on an owner of said lot 23 within the ninety days required after the filing as to the respective alleged mechanics' lien claims herein, contrary to the provisions of section 8228, Revised Statutes of Missouri, 1909, and as the prosecution of said suit and of said alleged mechanics' lien claims was not without unnecessary delay with respect to said other holder of said deed of trust and owner of said lot 23, any accounts, statements and alleged lien claims filed by plaintiff or any of the defendants, cannot become liens against the said three lots nor against the buildings and improvements thereon, and as any such alleged accounts, statements or alleged mechanics' lien claims cannot affect the interest of said holder of said deed of trust on and the owner of said lot 23, none of them can or should be established as mechanics' liens against this defendant's interest in said lots 22 and 24, and the building and improvements thereon, particularly as each and all of said alleged mechanics' liens, accounts, statements and claims are in blanket form as claims against all of said three lots and the buildings and improvements thereon, and not apportioned as to the respective lots and buildings and improvements

thereon." Further setting out that plaintiff and the other defendants each make claim to some interest in and to this defendant's said lots and buildings and improvements thereon, this answer attacks the claim of defendant Goldberg as of no validity. Finally, the Laclede Trust Company prays the court to define, adjudge and determine the estate, title and interest of all the parties hereto severally in and to each and all of the lots and buildings, that the defendant Trust Company be declared the absolute owner of lots 22 and 24 and the buildings and improvements thereon and that none of the other parties to the suit have any right to, claim or lien or interest therein and that the defendant Goldberg be enjoined from asserting any claim on any of the lots by virtue of his alleged judgment, and the Trust Company prays for such other and further orders and relief as may seem proper.

Replies were filed to this last answer and on March 9, 1915, default was entered against the Monroe Construction Company, Lovett, Goodnow, the trustee, and the Lanes, as was done also afterwards against the defendant Eva L. Wertz, who was brought in by alias summons.

The cause was heard before the court on June 9, 1915, and on July 19, 1915, during the June term of the court, it entered up judgment, finding that the defendant Lane, on and prior to February 3, 1914, was the owner in fee of the contiguous lots or premises, describing them as set out in the petition; that on that date Lane and his wife transferred the property by warranty deed to the defendant Eva L. Wertz and that this transfer to Eva L. Wertz was for the convenience of the grantors and that said Eva L. Wertz had no personal interest in the property, she on that same date conveying it to the Monroe Construction Company by deed duly recorded and that this conveyance was made pursuant to a contract entered into between the Monroe Construction Company and Charles E. Lane, made prior to February 3, 1914, by which Lane agreed to convey the property to

defendant Monroe Construction Company, and that on or before January 17, 1914, the Monroe Construction Company was the equitable owner of the above described premises; that that company proceeded to erect and construct on the premises three one-story brick buildings, describing them, commencing the erection of the buildings on January 17, 1914, and thereafter on January 29, 1914, the Monroe Construction Company contracted in one general contract respectively with the plaintiff and the St. Louis Lumber Company for the furnishing of material for the three houses; that after the commencement of the erection of the buildings and during their erection the Monroe Construction Company executed and delivered the three deeds of trust first mentioned, describing them, and that the same company afterwards executed the three second deeds of trust, all executed to Goodnow, trustee for Lovett, as averred; that at the time of the institution of this suit the Laclede Trust Company was the holder of the notes secured by the first deeds of trust on lots 22 and 24 and subsequently became the owner of the lots by foreclosure under those deeds of trust; that the Monroe Construction Company had executed and delivered the three first deeds of trust in order to raise and procure the funds and money necessary to pay for the labor and material to be used in the erection of the building and improvements; that the proceeds of the deeds of trust were actually used in and for labor and material used in and entered into the construction of the buildings and improvements; that at and prior to the commencement of this action the defendant Monroe Construction Company was and is now indebted to the plaintiff and to the defendant St. Louis Lumber Company in the sums hereinafter severally stated for work and material severally done and furnished and used in the construction of the buildings and that the plaintiff and defendant St. Louis Lumber Company have established and perfected their mechanics' lien for said several sums on the premises, and setting out the accounts as claimed and adding interest, judgment is entered against the Monroe Construc-

tion Company in favor of the Hydraulic Press Brick Company and the St. Louis Lumber Company for those amounts and costs of perfecting their liens and against the defendant Goldberg on his claim to a lien, liens being declared in favor of the plaintiff and the St. Louis Lumber Company for their judgments against the lots, describing them as set out in the petition and as being contiguous. The court further adjudges and decrees that all and singular the mechanics' liens and judgment thereon herein adjudged as aforesaid "are prior and superior to the liens created by the above-mentioned deeds of trust securing the payment of promissory notes therein respectively described, executed by the Monroe Construction Company on the parts and portions of said property hereinabove described and superior to the interests of Charles E. Lane, Lora B. Lane, his wife, Eva L. Wertz, Monroe Construction Company, Lacedede Trust Company and the holder of the deed of trust on lots 23." Goldberg is also enjoined from levying any execution on the premises herein described by virtue of his judgment heretofore obtained before the justice, purporting to establish a mechanics' lien on the property.

The judgment then proceeds to award, first, general execution against the Monroe Construction Company and if the debts adjudged are not satisfied then special execution for any balance, the residue be made out of the property by sale thereof as in the case of the sale of real estate under judgments and executions, the order directing the sheriff "to sell said three dwellings and the parcels of ground upon which they are situated, separately and each one for itself, the proceeds of the sale of said three houses to be held and kept separately and to be reported to the court, approve or disapprove said sales or either of them, and this court to marshal and distribute said proceeds among the parties hereto according to their respective legal and equitable rights therein, by such further orders and decrees as this court may then give."

“And the court does retain jurisdiction of this action for such further orders and decrees as may be proper.”

The Laclede Trust Company filing its motion for a new trial as well as in arrest of judgment and both of them being overruled, has appealed to this court, the respondents being the Hydraulic Press Brick Company and the St. Louis Lumber Company.

REYNOLDS, P. J.—(after stating the facts as above). It will be noticed that as there were several parties claiming to hold mechanics, or materialmen's liens against the property, this proceeding is under the provisions of the Act of the General Assembly of our State, approved April 3, 1911 (Laws 1911, p. 314), as it has for its object the marshalling and distribution of the proceeds of the sale of the property among the parties according to their respective legal and equitable rights therein, and is to be treated as an “equitable action for the purpose of determining, establishing and enforcing the various and respective rights of the parties thereto and for the purpose of marshalling, applying and distributing the proceeds of the sale of such property that may be ordered and decreed in said action.” See section 8235a, Act of April 3, 1911, above referred to.

A question suggested itself to the court as to whether the judgment entered therein was a final judgment.

We have set out the judgment practically in full and it will be noticed that it substantially follows the provisions of section 8235a, Laws 1911, p. 314, ordering, however, a sale of each lot separately, and directing the sheriff to report the result of the sale and to hold the proceeds of the sale subject to the order of the court, the court retaining jurisdiction of the cause for that purpose. After submission, we ordered the cause set down for argument on the question of whether there was a final judgment in the case, from which an appeal would lie. That has been argued before us. Our conclusion is that it is a final judgment as sustains an appeal,

and so counsel for the respective parties claim. It is said, 3 Corpus Juris., page 445:

"If that which may come before the court for further action or direction is necessary for carrying the judgment or decree into effect, or is merely in execution of the judgment or decree, it is final and appealable. Therefore, a reservation in a decree of a right to apply to the court for any order that may be necessary to the due execution of the decree does not destroy its appealability. And a judgment which completely settles the rights of parties is final, although there is an order retaining the cause on the docket for the purpose of executing the judgment, which is discharged by the payment of the amount of the judgment into court."

It is further said in the same work, page 449, that "according to the weight of authority, the proper distinction is that if the decree disposes of all questions within the pleadings, and nothing remains but to adjust an account between the parties in the execution of the decree, or there is a reference as to a collateral matter only, it is final for the purpose of an appeal; . . ." And it is further said, page 459 (sec. 274) of the same work, that in accordance with the principle stated before and "aside from any statutory provision the general rule is that a judgment, order, or decree which adjudicates and settles all the equities and substantial merits of the controversy is final for the purposes of an appeal, although some incidental or dependent matter may still remain for adjustment, or further proceedings may be contemplated and necessary in the execution of the judgment, order or decree." In line with this, see *Hemm v. Juede*, 153 Mo. App. 259, 133 S. W. 620; and *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 582. We therefore hold that there is a final judgment in this cause from which an appeal lies.

The learned counsel for the appellant makes three assignments of error: First, that the court erred in subjecting the deed of trust held by the Laclede Trust Company and its interests to any mechanics' lien in favor of plaintiff; second, in subjecting the deed of trust

held by the Laclede Trust Company and its interests to any mechanics' lien in favor of the St. Louis Lumber Company; and, third, "if the Laclede Trust Company, to protect its interests, must pay, it should not be required to pay all or to pay for what went into the building on lot 23, in which it was not interested, but only for what went into the two buildings on which it had the deed of trust, and if required to pay all, then there should be provisions and directions as to what could be done for its reimbursement against the interests in lot 23 and the building thereon." All these will be considered together.

The first point made by learned counsel for appellant under these assignments is to the effect that the only service in this State as to the holder of the first deed of trust on lot 23 and the building on it was by publication and the suit could not be deemed commenced as to such holder until plaintiff had done all it could do to secure and make complete such service by publication, it being argued that this suit was not commenced as to such holder within ninety days after the filing of plaintiff's alleged mechanics' lien, and therefore did not bind such holder of the first deed of trust and the interest it held in lot 23 and building thereon, and that such lien failed to bind such holder and the first deed of trust and interest it held in lot 23 and its building being an alleged "blanket lien," seeking to bind all, it also failed to bind the Laclede Trust Company, under the first deed of trust and the interest it held in lots 22 and 24 and the buildings thereon. It is also urged that there was an unnecessary delay by plaintiff in prosecution of the suit for mechanics' lien, which it is claimed, was fatal. We see no merit in either contention.

A suit is held to have been commenced in our State by the filing of a petition with the clerk of the proper court. [Revised Statutes 1909, section 1756.] Construing this section, our Supreme Court held in *South Missouri Lumber Co. v. Wright*, 114 Mo. 326, 21 S. W. 811, that this had always been the law of our State prior to the enactment of the section, namely, that the

filing of the petition was the commencement of the action, and that that section made no practical change in the law as it had uniformly been construed. In *State ex rel. Evans v. Broaddus*, 245 Mo. 123, 149 S. W. 473, our Supreme Court said (l. c. 137), construing this same section, that it has always been held that an action is begun in a court of record when the petition is filed, "this, even although summons may not thereafter be issued until the action is barred." Many cases are cited in support of this. So *Riverside Lumber Co. v. Schafer*, 251 Mo. 539, 158 S. W. 340, also holds.

Learned counsel for the appellant argues that this does not apply to orders of publication. We find no authority which sustains any proposition of this kind.

But it is said that there was undue delay on the part of the plaintiff, apparently, in proceeding with the case.

This action was commenced by the filing of the petition, which occurred October 5, 1914. The cause was returnable to the December term of the court. At that term the order for publication was issued and publication duly made and proof of publication filed. The plaintiff, of course, was a party to the action and had commenced it within ninety days after filing its mechanics' lien. The defendant *St. Louis Lumber Company*, a party to the action named as a lien claimant, filed its lien September 23, 1914, and filed its answer setting up its lien in the case at bar December 7, 1914. That was within the ninety days required by law.

Learned counsel for appellant seems to contend that the *St. Louis Lumber Company* should have sued out a new order of publication. We know of no law requiring this. The publication sued out by the plaintiff was sufficient for the whole case and the *Lumber Company* was entitled to the benefit of that.

Section 8235e of the Act of April 3, 1911 (Laws 1911, p. 316), provides that the court shall have full power and jurisdiction to speed such an action and require service of process to be obtained speedily upon all parties therein "at the instance of any party either

plaintiff or defendant in said action or of its own motion." We find no application to the court by any party, nor did the court enter any order speeding the action, and the examination of the proceedings in the cause, as brought up to us by a supplemental abstract, shows that the cause was proceeded with in due, timely and orderly manner. The appellant itself, on April 9, 1915, was granted fifteen days to plead on its own motion and it did not file the answer upon which it subsequently stood, that being its second amended answer, until April 24, 1915. The cause came on for hearing before the court on June 9, 1915, and was then heard.

Counsel for appellant relies on the decision of our Supreme Court in Pitkin v. Flagg, 198 Mo. 646, 97 S. W. 162, as holding there was a fatal lack of diligence here. That has no application whatever here. In that case the circuit court ordered the plaintiff to bring in certain parties whose residence was known to plaintiff by a certain term. The plaintiff failing to do that, the court dismissed the cause and the Supreme Court held that was proper.

We see in this no delay which could be charged as unreasonable or with which the plaintiff or the St. Louis Lumber Company are responsible.

Beyond controversy the Laclede Trust Company is now the owner of lots 22 and 24. The present owners of lot 23 and of the notes and deeds of trust on it are alleged to be unknown but are brought in by the order of publication. Whatever rights they have have been determined in this cause as subordinate to the lien claims adjudged. The liens were filed on all three of the lots and this suit proceeds against, and its judgment concludes all known and unknown owners of the several notes or deeds of trust and the liens are held to be superior to all other claims. If there are equities between the unknown owners of lot 23 of the incumbrance on it and the Laclede Trust Company, they are not presented before us in such a manner that we can now determine them.

Discovering no reversible error in the proceedings and judgment of the circuit court, that judgment is affirmed. *Allen and Becker, JJ.*, concur.

STATE ex rel. ANNIE M. TEMPEL and GUSTAVE A. TEMPEL, Executors of the Estate of THEODORE H. TEMPEL, Relators, v. VITAL W. GARESCHE, Judge of the Circuit Court, City of St. Louis, Respondent.

St. Louis Court of Appeals. Opinion Filed February 5, 1918.

1. **PROHIBITION: Demands against Estate: Legal Services: Probate and Circuit Courts: Concurrent Jurisdiction.** A claim of an attorney for legal services rendered an estate at the instance of an executor, is a proper subject of a demand against the estate within the meaning of section 197, Revised Statutes 1909; and the circuit court has concurrent jurisdiction to try an action brought to recover for such services.
2. ———: ———: ———: **Jurisdiction of Circuit Court.** The circuit court has jurisdiction to decide whether or not legal services rendered at the instance of an executor are demands against the estate under section 197, Revised Statutes 1909, in a suit by an attorney against the estate seeking to establish his claim.

Original Proceeding in Prohibition.

WRIT QUASHED.

D. J. O'Keefe and Rippey & Kingsland for relators.

(1) Probate courts in this State are vested with exclusive, original jurisdiction to settle the accounts of executors and administrators. Art. 6, sec. 34, Const. of Mo.; Secs. 2292, 4056, R. S. 1909. (2) Circuit courts have no jurisdiction at law to allow attorney's fees for services in behalf of an estate in the course of administration for the reason that the liability for such services are but expenses of administration and not such demands as may be established by a judgment at law in a circuit court. 2 Woerner on Administration, sec. 356,

p. 819; Garnett v. Carson, 11 Mo. App. 290; Stephens v. Cassity, 104 Mo. App. 210; Gurnee v. Maloney, 38 Calif. 85; Youngston v. Bond, 69 Neb. 356; State ex rel. O'Brien v. Walsh, 67 Mo. App. 348. (3) Circuit courts cannot assume jurisdiction in equity to adjust and enforce payment for expenses of administration out of the assets of the estate, unless special equitable circumstances appear rendering the remedy afforded in the probate courts inadequate. French v. Stratton, 79 Mo. 560; Pearce v. Calhoun, 59 Mo. 271; Matson & May v. Pearson, 121 Mo. App. 120; Nichols v. Reyburn, 55 Mo. App. 1; Yeakle v. Priest, 61 Mo. App. 47.

T. D. Cannon and F. C. O'Malley for respondent.

(1) (a) The circuit court of St. Louis is a court of general jurisdiction and has jurisdiction to hear and determine the issues arising in the case of Cannon v. Tempel, executors; prohibition should be denied. State ex rel. Bernero v. McQuillen, 246 Mo. 517, 532. (b) A writ of prohibition cannot be made to perform the functions of an appeal or writ of error. Its purpose is not to review and correct errors but to prevent the usurpation of judicial authority. State ex rel. v. Kimmel, 183 S. W. 651, 652. (2) Circuit courts in this State have jurisdiction to hear and determine an action against the estate of a deceased person, by an attorney at law, brought for the purpose of establishing a demand for professional services, rendered by him, under the employment of the Executor or Administrator for the benefit of the estate. Section 197, R. S. 1909; Nichols v. Reyburn, 55 Mo. App. 1; Matson et al. v. Pearson, 121 Mo. App. 120; Bank v. Clifton, 263 Mo. 200.

ALLEN, J.—This is an original proceeding in prohibition. The relators, executrix and executor of the estate of Theodore H. Tempel, deceased, presented to one of the judges of this court, in vacation, a petition praying for a writ of prohibition against the respondent judge to prohibit him from further entertaining juris-

diction of a certain cause pending before him, wherein Thomas D. Cannon, Esq., attorney at law, is plaintiff, and these relators are defendants. A preliminary writ was issued to which the respondent duly filed his return; and the cause has been argued and submitted to us as upon a demurrer to the return.

The conceded facts are as follows:

The estate of Theodore H. Tempel, under whose will the relators are executrix and executor, is in process of administration in the probate court of the county of St. Louis. On September 14, 1917, Thomas D. Cannon instituted the action mentioned above, in the circuit court of the city of St. Louis, against the relators in their representative capacity, to recover attorneys' fees for legal services alleged to have been rendered to the said estate at the instance and request of relator Annie M. Tempel. The petition prays judgment in the said sum of \$754, the alleged reasonable value of the services, and for an order directing the defendants therein to pay such sum to plaintiff out of the funds of the estate in their hands. Thereafter that proceeding came before the respondent judge, sitting in Division No. 14 of said circuit court, and he was proceeding to entertain jurisdiction therein when halted by the issuance of our preliminary rule in prohibition.

The question before us, therefore, is whether the proceeding pending in the circuit court of the city of St. Louis, mentioned above, is one within the jurisdiction of that court. It is argued in behalf of the relators herein that the probate court, wherein an estate is being administered, is vested with exclusive original jurisdiction to make allowances for attorneys' fees for legal services rendered the estate at the instance of the executor or administrator; that such fees are a part of the expenses of administration, to be allowed as such by the probate court in settling accounts of the executor or administrator, and are not demands against the estate within the meaning of section 197, Revised Statutes 1909; and that consequently the circuit court has not concurrent jurisdiction with the probate court

to establish a claim of this character as a demand against the estate. The questions thus raised have frequently been before our courts.

In *Nichols v. Reyburn*, 55 Mo. App. 1, this court upon the authority of *Gamble v. Gibson*, 59 Mo. 585; *State ex rel. Ziegenhein v. Tittmann*, 103 Mo. 553, 565, 15 S. W. 941; *Powell v. Powell*, 23 Mo. App. 368, and other decisions cited, held that the claim of an attorney for legal services rendered at the instance of an administrator, and beneficial to the estate, was a proper subject of a demand directly against the estate; and that the circuit court had original jurisdiction of an action to establish such demand. And the ruling in that case to the effect that a claim of this character may be made the subject of a demand against the estate has been followed by this court in the following cases, viz.: *Yeakle v. Priest*, 61 Mo. App. l. c. 50, 51; *Matson & May v. Pearson*, 121 Mo. App. 120, 97 S. W. 983; *Mayhall v. Stoecker*, 191 S. W. 1117. There is an early decision of our court to the contrary, viz., that in *Garnett v. Carson*, 11 Mo. App. 290, but it has not been followed.

In *State ex rel. O'Brien v. Walsh*, 67 Mo. App. 348, the Kansas City Court of Appeals, following *Nichols v. Reyburn*, supra, held that the probate court is clothed with jurisdiction to allow an attorney's claim for legal services directly in his favor, and to order its payment out of the assets of the estate. However, in *Stephens v. Cassity*, 104 Mo. App. 210, 77 S. W. 1089, that court without reference to the *Walsh* case or the prior decisions of this court, supra, held to the contrary. Referring to the ruling in the *Stephens* case, this court in *Matson & May v. Pearson*, supra, 121 Mo. App. l. c. 134, 97 S. W. 983, said: "This case, however, is not in harmony with the prevailing adjudications on the subject. It seems to ignore the entire trend of the adjudicated law in this State with respect to matters of this sort, and directly conflicts with both *Nichols v. Reyburn*, decided by this court, and *State ex rel. v.*

Walsh, 67 Mo. App. 348, decided by the Kansas City Court of Appeals.”

It will be seen therefore that relators' contention that a claim of this character cannot be made the subject of a demand against an estate, is not borne out by the trend of authorities in this jurisdiction. And if the claim sought to be enforced in the proceeding pending before the respondent judge is one which may be asserted as a demand against the estate, it cannot be doubted that it is justiciable in the circuit court which, by virtue of the statute, has concurrent jurisdiction with the probate court in such proceedings. [See *Nichols v. Reyburn*, *supra*; *Matson & May v. Pearson*, *supra*, and cases cited.] It is true that in *Stephens v. Cassity*, *supra*, it is said that the circuit court is without jurisdiction in such cases; but, as remarked above, this decision is out of line with the trend of authority on the subject in this State.

In this connection it should be said that though the relators deny that the circuit court has jurisdiction in an ordinary proceeding at law to establish a claim such as this, as a demand against an estate, they appear to concede that under exceptional circumstances the equity powers of the circuit court may be invoked in cases of this general character. And by this means it is sought to reconcile the cases in this State touching the matter in hand. But the distinction thus attempted to be made is obviously not a sound one. It is true that in *Matson & May v. Pearson*, *supra*, the suit was one in equity, but the decision in that case does not by any means proceed upon the theory that the jurisdiction of the circuit court over suits to enforce a claim for attorney's fees, as a demand against an estate, is contingent upon allegation and proof of facts making the case one of equitable cognizance. In that case equity was resorted to, not because it was essential to do so in order that the cause be brought within the jurisdiction of the circuit court, but in an effort to have the claim allowed as one taking precedence over claims of creditors generally.

That the respondent judge was not proceeding in excess of his jurisdiction in the premises, we regard as entirely clear. Indeed for our purposes we think that it would be sufficient to say that under the law the proceeding in question, pending before the respondent, belongs to a general class of cases over which the circuit court has, under the law, jurisdiction. In other words that court has concurrent jurisdiction with the probate court in suits to establish demands against estates. The plaintiff, in the action in the circuit court, is seeking to establish his claim as a demand against the estate, and it seems quite clear that the circuit court is vested with jurisdiction over the cause, with authority to determine, *inter alia*, whether the claim asserted is one which may, under the law, be enforced as a demand against the estate. In *Richardson v. Palmer*, 24 Mo. App. 480, the action was one in the circuit court to recover from an estate damages for fraudulent representations alleged to have been made by the defendant administrators in connection with the sale of an animal at an administrator's sale. It was held that the suit was one within the jurisdiction of the circuit court; though it was ruled that the estate was not liable for any false representations made by the administrators, and that the demurrer to the evidence should have been sustained. So much of the opinion of PHILIPS, P. J., in that case as dealt with the question of the jurisdiction of the circuit court was approved by the Supreme Court in *State ex rel. Ziegenhein v. Tittmann*, 103 Mo. 553, 15 S. W. 941, and it has been quoted approvingly by the Supreme Court in the recent case of *Bank v. Clifton*, 263 Mo. 200, 1. c. 216, 217, 172 S. W. 388.

We are here concerned only with the question of the *jurisdiction* of the circuit court; having naught to do with the merits of the cause pending therein. And in the view expressed in the immediately preceding paragraph we are not embarrassed by the decision in *Stephens v. Cassity*, *supra*, since we are bound by the recent decision of the Supreme Court in *Bank v.*

Clifton, *supra*, which we regard as here in point and hence controlling authority.

It follows that our writ herein was improvidently issued, and that it should be quashed. It is accordingly so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

MARY RAIL, Appellant, v. THE NATIONAL NEWS-
PAPER ASSOCIATION, Respondent.

Kansas City Court of Appeals, December 22, 1916.

1. **LIBEL AND SLANDER: Instructions: Power of Trial Court: Law and Fact.** In an action for libel the jury are the judges of both the law and fact, but it is the function of the trial judge to give instructions as in other cases, except that in libel cases the instructions are merely advisory, and if the pleadings and evidence fail to disclose a cause of action the court has the power to direct the jury to return a verdict for the defendant.
2. ———: **Innuendo.** The office of the *innuendo* in libel and slander cases is to set a meaning upon words or language of doubtful or ambiguous import which alone would not be actionable.
3. ———: **Definition of Libel.** Libel is defined by statute (Section 4818, R. S. 1909) to be the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse.
4. ———: **Defamatory Words.** Words are libelous *per se* which within themselves necessarily carry a defamatory meaning and are not libelous *per se* if they are susceptible of a reasonable interpretation which excludes a defamatory imputation.
5. ———: ———: **Falsity Thereof: Evidence.** The falsity of all defamatory words is presumed in the plaintiff's favor and he need give no evidence to show them false. The burden is on defendant to rebut this presumption by evidence in support of the plea of justification.
6. ———: **Express Malice: Evidence.** When slanderous words are spoken, or a libelous article is published falsely the law will affix malice to them, there being no necessity to offer proof of express malice.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover, Judge.*

REVERSED AND REMANDED (*with directions*).

Hadley, Cooper & Neel and *W. W. Bryant* for appellant.

Frank M. Lowe for respondent.

JOHNSON, J.—This is an action for libel against the proprietor of the Kansas City Post, a newspaper of general circulation published at Kansas City. The jury returned a verdict for plaintiff for \$500 actual and \$1000 punitive damages, but the court sustained defendant's motion for a new trial "on account of errors in plaintiff's instructions," and plaintiff appealed.

The petition alleges that on August 24, 1910, defendant published of and concerning plaintiff the following false and defamatory article:

**"BABY FARM IS FOUND IN APARTMENT HOUSE:
TWO ARRESTED; ONE BABY DIES."**

"Mary Rail and Dr. Joel McDaniel held under \$500 bond. Woman well known to police (meaning to charge and the readers of said article so published by defendant, as aforesaid, understood defendant to charge, and the defendant meant that the readers of said articles should understand the same to charge that this plaintiff, by reason of frequent and numerous violations of the law, has become and is well known to the police) formerly ran home for babies on the west side.

"Bodies of six infants found in Kansas City sewers recently. Unable to tell the police history of any child in her charge; woman denies responsibility for death of children; one baby dead; another dying at St. Anthony's Home.

"Pursuing their investigations into the finding of six dead babies within the last few months in sewers in the neighborhood of Thirteenth and Fourteenth and

Harrison Streets, the police last night went into the apartments of Mrs. Mary Rail, alias Miss Chardis Lundin" (meaning to charge and the readers of said article so published by defendant, understood defendant to charge that this plaintiff has, in common with professional criminals, more than one name, designated as an "alias") "at 1515 Harrison Street." (Meaning to charge and being understood by the readers of said article, to charge, that the plaintiff is guilty of divers crimes, to-wit, the killing of six infants and has disposed of the bodies of said infants by placing them in sewers in her, plaintiff's immediate neighborhood.) "They found four babies, all in sickly condition, one dies this morning and another is dying at St. Anthony's Home, Twenty-third Street and College Avenue. The other two babies probably will not live." (Meaning to charge, and being understood by the readers of the said article, to charge that plaintiff was responsible for the alleged sickly condition of the last-mentioned four babies; that the plaintiff was responsible for the alleged death aforesaid of one of the above-named four babies; that plaintiff was responsible for the alleged dying condition of the baby aforesaid in St. Anthony's Home; that the plaintiff was responsible for the alleged condition of the other two babies of the above-named four, which alleged condition pointed to the certain death of said two babies.)

"Mrs. Rail and Dr. Joel McDaniel, 211 East Twelfth Street, were arrested by Detectives Zickefoose and Farrell. They were arraigned in the municipal court this morning on charges of violating the city ordinance governing the birth, death and adoption of infants."

"NEIGHBORHOOD IS SURPRISED."

"The case was continued until next Tuesday morning, to allow the defendants to get some witnesses. The two were released on \$500 bond each.

"The raid and the arrests bewildered others who live in the three-story apartment house on Harrison

Street. Although several families lived there, no person knew there had ever been a baby in the rooms of Mrs. Rail until the detectives carried the infants out last night to send them to St. Anthony's Home." (Meaning to charge and the readers of said articles so published by the defendant, as aforesaid, understood the defendant to charge, and the defendant meant that the readers of said article should understand the same to charge that plaintiff had the said babies in her charge, intending to murder them, and, that on account of said felonious intention, the presence of the four babies aforesaid in her apartment was kept a profound secret.)

"In explanation of the four babies there, Mrs. Rail said she was nursing them and trying to find good homes for them at the recommendation of Dr. McDaniel. The physician said most of the babies taken to the woman's place came from 2111 East Seventh Street, an institute. He said that the mothers of the children had asked him to find good homes for their little ones and that he sometimes put babies in charge of Mrs. Rail."

"DENIES KNOWLEDGE OF OTHERS FOUND DEAD."

"When questioned about the bodies of the six babies taken from the sewers in that neighborhood during the last few months, the woman (meaning this plaintiff) said she knew nothing about them. She refused to tell the officers of any person with whom she had found homes for the little ones left in her care." (Meaning to charge and being understood by the readers of said article to charge, that said six babies alleged to have been found in sewers aforesaid, were received by the plaintiff, murdered, and their bodies cast into the sewers in the vicinity of her home.) "She would not give the history of any particular baby—where she got it, what she did with it, who was its mother or who had adopted it. Nothing that she said served to clear up the mystery which the police have been working upon for many months." (Meaning to charge, and

being understood by the readers of said article, to charge that plaintiff had received the said six babies for the purpose of murdering them.)

"Of the four babies taken from the Rail establishment last night and removed to St. Anthony's home one died this morning from a disease having the appearance of yellow jaundice, another is covered with sores, and apparently has not long to live, and the other two are sickly."

"Mrs. Rail told detective Zickefoose last night that the babies came from 2111 East Seventh Street. One, she said was born yesterday, two Sunday and one Saturday."

"BABIES MORE THAN A WEEK OLD."

"Dr. W. L. Gist of the emergency hospital, who examined the infants last night, said that one was fully three weeks old and that none of the others was less than ten days old.

"Mrs. Rail and Dr. McDaniel are held on three charges, violations of sections 716, 855 and 856 of the Revised Ordinances of Kansas City. These sections provide that physicians must report all births and deaths to the Board of Health; that no person may conduct a baby farm without a permit from the Board of Health, and that infants for adoption must be reported to the Board of Health, and that permits for their adoption must be obtained by those adopting the child and also those giving away the child."

"FORMERLY OPERATED A BABY FARM."

"Mrs. Rail formerly operated a baby farm at 1735 Washington Street. The police knew about her then but she was never molested." (Meaning to charge, and being understood by the readers of said article, to charge that the plaintiff had a police record at the time of her alleged residence at 1735 Washington Street.)

"More than a year ago the woman moved to the Tencrede Apartments at 1515 Harrison Street, but it was not suspected until recently that she was again

trafficking in babies." (Meaning to charge, and being understood by the readers of said article to charge that the plaintiff bought and sold babies.) "She occupies the third floor apartment on the front side of the house."

"There are two entrances, one by the front door into a vestibule, from which a stairway leads to all the apartments, three on either side, and a rear entrance by way of stairs, leading up from an areaway.

"There are five rooms in the apartment. The babies which Mrs. Rail had in her possession from time to time were kept in three middle rooms, so that any visitors coming into the front room, and trades people coming in from the rear, never saw the babies." (Meaning to charge and the readers of said article understood the defendant to charge and the defendant meant that the readers of said article should understand the same to charge that this plaintiff was keeping the said babies secretly so that she could dispose of them in unlawful ways.)

"NEVER SAW BABIES TAKEN INTO HOME."

"Persons occupying other apartments in the house told a Post Reporter that they did not know Mrs. Rail was operating a baby farm until the police came there last night. They never saw Mrs. Rail taking babies in or out, they said, and the police supposed she transported the babies at night by way of the back stairs." (Meaning to charge, and being understood by the readers of said article to charge and the defendant meant that the readers of said article should understand the same to charge that the plaintiff maintained a covert repository in which she insiduously and secretly received babies and concealed them until she disposed of them by murdering them and dumping their dead bodies into the sewers.)

"When she was arrested, Mrs. Rail made but a brief statement to the detectives, denying that she was working in co-operation with Dr. McDaniel. 'I have not been working with him,' she said. 'The babies I

had were sent to me by their mothers.' 'In some cases Dr. McDaniel was the attending physician and recommended me, but he has nothing whatever to do with my place.'

"To a Reporter for the Post (meaning this defendant) Dr. McDaniel denied that he had violated any of the city or State laws in regard to the birth or adoption of babies."

"EVERYTHING PROPER DECLARES DOCTOR."

"'Every birth I have attended,' he said, I have certified according to law within the required ten days.' 'In every case where a child has been adopted, in which I had any part, papers have been executed and filed properly.'

"'I have not been connected with any of Mrs. Rail's enterprises or with'— (Continued on page 5, column 3).

"(THEN FOLLOWS DIVERS PICTURES OF BABIES AND A PICTURE OF AN APARTMENT HOUSE.)

"AT TOP—FOUR BABIES FOUND IN APARTMENT OF MRS. RAIL AT 1515 HARRISON STREET. AT LEFT—THE APARTMENT HOUSE WHERE MRS. RAIL LIVES. AT RIGHT—ONE OF THE CHILDREN FOUND BY THE POLICE."

"BABY FARM RAIDED; PHYSICIAN AND A WOMAN ARE HELD."

"FOUR INFANTS FOUND IN APARTMENT. IN AN APARTMENT BUILDING 1515 HARRISON STREET."

(Continued from page 1).

"'2111 East Seventh Street, although I have attended cases at the latter place.'

"At 2111 East Seventh Street this morning a young woman who said she was a sister to Miss Opie Stevenson, the manager, denied that the place was a lying-in

institution. She said that Miss Stevenson was out of the city.

“ ‘We have a boarding house here’ she said. ‘And we take well boarders as well as sick ones.’ ‘I think Dr. McDaniel has been here a few times, but I do not know what for.’ ”

The answer admits the publication, denies that it was false and defamatory, and pleads justification and and privilege. The material facts of the case thus may be stated:

Plaintiff was married in 1893, in Ohio, to August P. Lundin and was granted a divorce from him in 1902. They had three children, two boys and a girl, who remained in the custody of their mother and were supported by her. She had no means and worked for a living. At different times she keep boarders, conducted a rooming house, worked in a department store and as car cleaner for the Pullman Company. In 1905, she married F. P. Rail at Atlantic, Iowa, and they lived together at Omaha for six months when she left him, on account of ill treatment, and removed with her children to Kansas City. In November, 1909, she began keeping boarders at number 1735 Washington Street and applied to her family physician for employment as a nurse in confinement cases and was referred to Doctor McDaniel, who appears to have been interested professionally in a lying-in hospital. Frequently he attended confinement cases in that institution in which he undertook to provide temporary care for the infants until he could find permanent homes for them. He arranged with plaintiff for her to care for such babies at her home, agreeing to pay her two dollars per day for her services in each case. She was not to be informed of the history of her respective charges, was expected to make no inquiries, but was to receive the babies sent by the doctor, give them proper care and attention and deliver them to persons provided with written authority from the doctor to receive them. Two babies were sent to her and cared for by her under this employment while she lived on Washington Street. Then she and her family moved to

a flat on the third floor of an apartment house at number 1513 Harrison Street and altogether she received six babies at that place, four of whom were in her custody at the time of her arrest by officers of the Hospital and Health Board. No infant had died while in her charge. She had not complied with the provisions of a city ordinance for the regulation of "baby farms" which required that "any person . . . engaged in the business of keeping or boarding more than one child under two years of age for pay or receiving infants for the purpose of securing homes for them for pay shall obtain a permit from the Board of Hospital and Health," etc. She states that she had no knowledge of these regulations and supposed that Dr. McDaniel, her employer, had done whatever might be required by the laws to authorize her to care for such babies at her home.

One night officers called and inquired if she had babies under her care and, being answered in the affirmative, asked to see them. She complied with the request and after viewing the babies the officers withdrew but later returned in an automobile, with a matron, and informed plaintiff of their purpose to take her and the four infants to police headquarters. Two of the babies were sick, one with yellow jaundice and the other with syphilitic sores, the night was cold for the season and it was raining hard. Plaintiff protested against taking such young babies, especially the sick ones, out in such a night, but being told by the officers that they would assume responsibility for the consequences, she cut a woolen blanket into four parts for wraps for the babies, and went with them to police headquarters. She was not accused of mistreating these or any other babies, and the only charge made against her was that of running a "baby farm" without a license. She was released on bond and the babies were sent by the officers to a public institution where one died the next morning. Plaintiff pleaded guilty to the charge filed against her and was sentenced to pay the minimum fine of \$25 prescribed by the ordinance.

The only evidence introduced by defendant which might be interpreted as reflecting upon the conduct of plaintiff towards the babies is the testimony of officers and physicians of the Hospital and Health Board that they were sickly, appeared to have been drugged, and that one had syphilis and another yellow jaundice. All of the babies were very young, one not being a day old, and the two diseased ones were born diseased. One of the police officers testified that at a time before plaintiff moved to Harrison Street the body of an infant had been taken out of a manhole "on east Thirteenth Street." This was the only foundation for the statement in the published article that six dead babies had been found "within the last few months in sewers in the neighborhood of Thirteenth and Fourteenth and Harrison Streets." Plaintiff had never been arrested before and, as far as the record discloses, had always borne a good reputation, and there was no support for the statement in the article that she was "well known to the police." The statement that she was "Mary Rail alias Miss Chardis Lundin" was based on the fact that her telephone appeared in the telephone directory in the name of her daughter, Chordice Lundin, who was then only ten or eleven years old. This and some other circumstances disclose that plaintiff was observing secrecy in conducting her business, though her neighbors in Washington Street were told by her that she was taking care of babies for hire. There is no support in the evidence for the statement that plaintiff was questioned about the six dead babies "taken from the sewers in that neighborhood during the last few months," and "said she knew nothing about them."

The evidence relating to the plea of justification may be compressed into the statement that plaintiff was conducting a baby farm without a license and with secrecy—though with no greater secrecy than might be expected of one engaged in that kind of business.

The court overruled defendant's demurrer to the evidence and at the request of plaintiff instructed the jury: (1) "The court instructs the jury that the falsity

of all defamatory words is presumed in plaintiff's favor and she need give no evidence to show them false. The burden is on the defendant to rebut this presumption by giving evidence, if any, in support of the plea of justification."

(2) "The jury are instructed that in this case the defendant pleads justification; that is, it declares the statements contained in the publication complained of are true of and concerning the plaintiff. Under this plea, it is defendant's duty to prove the truth of the statements in the publication complained of in plaintiff's petition. And it is not sufficient for defendant to prove the truth of merely a portion of the statements contained in the publication complained of. Even though the defendant proved the truth of a portion of said publication, yet your verdict should be against defendant's plea of justification if you find from the evidence that it has failed to prove any material statement in the publication complained of, providing such statement is found by you from the evidence to be false and a libel upon plaintiff."

(3) "The court instructs the jury that the term 'malice' or 'malicious,' as used in these instructions, does not mean mere spite or ill will, but it means the intentional doing of a wrongful act without just cause or excuse."

(4) "The court instructs the jury if you find and believe from the evidence in this case that the defendant, National Newspaper Association, on or about August 24, 1910, published a certain newspaper in Kansas City, Jackson County, Missouri, called the Kansas City Post, and that defendant then published in said newspaper the article mentioned in evidence about the plaintiff, and that said article was libelous of the plaintiff and untrue, then your verdict will be for the plaintiff."

(5) "The court instructs the jury that libel is the false and malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke her to wrath or expose her

to public hatred, contempt or ridicule, or to deprive her of the benefits of public confidence and social intercourse."

(6) "The court instructs the jury that if you find for the plaintiff you will assess her damages at such sum as you may believe from the evidence will compensate her for the damage to her reputation and good name, if you believe her reputation and good name has been damaged, and for the mortification and humiliation and mental suffering endured by her, if you believe she did so suffer by reason of the printing and publishing by the defendant of the article complained of, not to exceed however, the sum of \$25000."

"And if the jury believe from the evidence that the defendant maliciously printed and published the article complained of about plaintiff, then you may, in addition to any compensatory damages above referred to that you may have assessed against said defendant, assess also against said defendant such punitive or exemplary damages as you may deem proper from the evidence, as a punishment to said defendant for the wrong done to plaintiff and as a warning to others, not, however, to exceed the sum of \$25000."

On behalf of defendant the jury were instructed:

(1) "The court instructs the jury that the language in the article published concerning plaintiff contains no language charging plaintiff with any crime or offense under the law except in so far as charging plaintiff with having kept a baby farm, and under the evidence the court instructs the jury that said charge was proven in this case."

(2) The court instructs the jury that the burden of proof in this case is upon the plaintiff to establish by a preponderance of all the testimony the following facts:

First. That the publication complained of was a materially inaccurate and therefore unfair report of the arrest of plaintiff and what occurred at the Municipal Court in Kansas City, August 24, 1910.

Second. That the language, as used in said article, was understood by those who read it to mean that plaintiff was a wicked and dangerous woman.

Third. That said article, as published, was false and defamatory to plaintiff, and unless you find all of these facts in favor of plaintiff from a preponderance of all the evidence, your verdict must be for the defendant."

(3) "The court instructs the jury that they are the judges of the weight of the evidence and of the credibility of the witnesses, and in determining the weight to be given to the testimony of each witness, you may consider the interest, if any, such witness may have in the result of this litigation and the conduct of the witness on the stand, and if you believe that any witness has wilfully sworn falsely to any material fact, you may reject the whole testimony of such witness."

(4) "The court instructs you that in this case words are to be taken in their ordinary English meaning and in that sense in which the ordinary reader would understand them. It does not matter how the plaintiff understood them or what the writer intended, but the article can only be libelous when the ordinary reader would understand it in a defamatory sense."

(5) "The court instructs the jury that you, and you alone, are the sole judges of the law and evidence in this case. Therefore, it is for you to determine from the evidence whether or not there is anything in the article published of and concerning plaintiff on August 24, 1910, that in any way reflected upon the character of plaintiff that has not been proven to be true, and if you believe from the evidence that the allegations in said article have been substantially proven in the case, then you must find for the defendant."

We agree with counsel for defendant that, in solving the question of the propriety of the action of the trial court in granting a new trial, we are not restricted to a review of the reasons which prompted that court to make the order, but if such reasons are found insufficient, the order will be sustained, if any

valid ground therefor appears in the record and was properly preserved in the motion for a new trial. As is said by the Supreme Court in *Chlanda v. Transit Co.*, 213 Mo. 244, though the trial court may give but one reason "and that a bad one, if there were other good reasons, then its action, producing a right result in the administration of justice can stand." The trial court refused to hold that error had been committed in overruling the demurrer to the evidence, but under the rule just stated, we first will dispose of the contention that the court should have directed a verdict for defendant.

Although the jury are the judges of both law and fact in libel cases, the function of the trial judge to give instructions is the same as in other cases, with the exception that in libel cases the instructions are merely advisory; and in such cases, as in others, if the pleadings and evidence fail to disclose a cause of action, the court has authority to direct the jury to return a verdict for the defendant. In *Tilles v. Pulitzer Pub. Co.*, 241 Mo. l. c. 647, the rule is stated that "if under the pleadings and evidence no case is made, the court may take the case from the jury by a peremptory instruction in the nature of a demurrer. . . . Libel suits, though *sui generis* (in a sense) are subject to those rules of practice found wise and useful in administering justice generally in the courts." [See, also, *Diener v. Pub. Co.*, 230 Mo. l. c. 621; *Heller v. Pub. Co.*, 153 Mo. l. c. 214; *Branch v. Krupp*, 222 Mo. l. c. 598; *Jones v. Murray*, 167 Mo. l. c. 53.]

Counsel for defendant is correct in saying that the business of keeping a baby farm is not unlawful and is recognized by the municipal laws as a vocation which may be honorably followed under a license issued by the Board of Hospitals and Health. But we cannot agree with the view that the only matter in the published article which could be regarded as libelous *per se* was the charge, conceded to be true and, therefore, fully justified, that plaintiff was prosecuting that business without a license and was arrested and taken to police

headquarters for that offense. That view proceeds from an erroneous conception of the effect upon the action of the innuendoes, pleaded in the petition, which were employed by the pleader to explain and apply to plaintiff every defamatory charge in the article, except the charge that plaintiff was operating a baby farm without a license, in violation of the ordinance. Plaintiff offered no evidence in support of the innuendoes and her counsel claim in their brief, and the instructions given at their request indicate, that they abandon them at the trial and proceeded upon the theory that every defamatory charge in the article was libelous *per se*, and that the innuendoes in the petition should be ignored as mere surplusage.

Defendant argues that plaintiff is bound by the construction she placed upon the article in her petition, and, if this were a sound view of her position, it would follow that her failure to prove the facts alleged by way of innuendo left her without a case to go to the jury, since all the charges thus left untouched were true and the defense of justification as to them was complete.

The office of the innuendo, as defined by the decisions in this State, is to set a meaning upon words or language of doubtful or ambiguous import which alone would not be actionable, and it follows, as is said in the case from which this definition is taken (*Callahan v. Ingram*, 122 Mo. 356), "that in case the defamatory meaning is apparent from the words used, an innuendo is unnecessary

. . . In such case the defendant can put in issue the truth of the words spoken, either with or without the alleged meaning. It will then be for the jury to say from the proofs whether the plaintiff's innuendo is sustained. If not, the plaintiff may fall back upon the words themselves, and urge that, taken in their natural and obvious significance, they are actionable in themselves without the alleged meaning and that, therefore, his unproved innuendo may be rejected as surplusage."

This definition of the office of the innuendo was reaffirmed in *Julian v. Kansas City Star*, 209 Mo. l. c. 91, and its application to the instant case leads to the con-

clusion that plaintiff was not bound to prove matters of innuendo relating to false charges in the article which were libelous *per se*.

The statutes (sec. 4818, R. S. 1909) define libel to be "the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." It is not necessary that the defamatory words should impute to the plaintiff the commission of a punishable crime. If "they contain that sort of imputation which is calculated to villify a man and bring him, as the books say, into hatred, contempt, or ridicule," they are actionable. [Starkie on Slander and Libel, pp. 231, 232.]

If "hatred, contempt and ridicule would naturally be produced by the words employed . . . they would be libelous *per se*." [McGinnis v. Knapp, 109 Mo. l. c. 149.] Words are libelous *per se* which within themselves necessarily carry a defamatory meaning and are not libelous *per se* if they are susceptible of a reasonable interpretation which excludes a defamatory imputation. [Lemaster v. Ellis, 173 Mo. App. 332.] In the case just cited the alleged slanderous words were that a man and a woman had run away together and "are now together in Pueblo." It was held they were not slanderous *per se*, since they did not "in and of themselves necessarily carry a slanderous meaning and impute acts of fornication," and the plaintiff was required, in order to recover, to plead and prove an innuendo. The authorities agree that where there is no ambiguity in the words—no double meaning—but they carry within themselves an imputation against the plaintiff of conduct which naturally would subject a person to hatred, contempt or ridicule, such words are to be regarded as libelous *per se*.

The charges and imputations in the article against plaintiff were clear, certain and free from ambiguity.

No reasonable person could read them without understanding that she was charged with the hideous practice of mistreating, if not actually murdering, babies given into her custody, and of disposing of the bodies of babies dying while in her possession, by secretly casting them into public sewers in the vicinity of her residence. The evidence adduced by defendant in justification afforded only the weakest support for such a charge. Clearly the article was libelous *per se*, and the court did not err in refusing to direct a verdict for defendant.

Passing to the instructions given at the request of plaintiff we find them free from prejudicial error, and that the reason assigned by the trial court for granting a new trial is not well founded. We have already shown that it was not necessary to submit issues of fact predicated upon the idea that the defamatory words were not libelous *per se*.

Instruction numbered one is supported by the decision of the Supreme Court in *Cook v. Printing Co.*, 227 Mo. l. c. 531, in which it is said: "The falsity of all defamatory words is presumed in the plaintiff's favor and he need give no evidence to show them false. The burden is on defendant to rebut this presumption by giving evidence in support of the plea of justification." [Citing *Newell on Libel and Slander* (2 Ed.), p. 651; *Odgers on Libel and Slander*, 170.]

The second instruction states a correct rule. [*Merriwether v. Knapp*, 120 Mo. App. l. c. 385; *Cook v. Printing Co.*, *supra*, l. c. 531.]

If proof of the truth of some of the facts stated in an article containing defamatory matter would be accepted as a justification of the defamation, the action for libel would no longer serve as an adequate protection to the reputation of the innocent, since it is seldom that the traducer does not endeavor to give substance and greater force to falsehood by mixing some truth with it. It is aptly said in *Cook v. Printing Co.*, *supra*, that the defense of justification must be as broad as

the charge—“proof of a part of the charge will not amount to a complete defense.” The inclusion of the term “any material statement” in that instruction does not amount to reversible error, for the reason just stated, that the defense of justification to which the term refers, must cover the defamatory matter in its entirety and the jury must have understood the term as referring to matters of defamation in the article. We must assume that the jury were possessed of ordinary understanding and common sense and if they were, they could not have understood this instruction as meaning that the defense of justification must fail if it established the truth of every defamatory charge.

The definition of *malice* in instruction numbered three is accurate. “When slanderous words are spoken, or a libelous article is published falsely, the law will affix malice to them. There is no necessity of proving express malice.” [Buckley v. Knapp, 48 Mo. 152; Fugate v. Millar, 109 Mo. l. c. 288; State v. Weeden, 133 Mo. 70; Minter v. Bradstreet Co., 174 Mo. l. c. 496.] “Malice in common acceptation means ill will against a person but in its legal sense it means a wrongful act done intentionally without just cause or excuse.” [State v. Weeden, *supra*.]

No objections can be found to instruction numbered 4, under our ruling that the article was libelous *per se*. Instruction 5, contains a proper definition of libel, and instruction 6, correctly stated the measure of damages. The point that instructions 1, 2, 4 and 6, cannot be reconciled with defendant's instructions numbered 1 and 2, is answered by saying these instructions of defendant were erroneous for reasons already sufficiently stated and defendant is in no position to claim any advantage from errors committed in its favor.

There was no prejudicial error at the trial and the verdict should not have been set aside. The judgment is reversed and the cause remanded with directions to enter judgment for plaintiff on the verdict. All concur.

ON REHEARING.

ELLISON, P. J.—A reconsideration of this case has left us convinced that our disposal of it at the other hearing was correct. But as defendant insists that the opinion rendered at that time approves plaintiff's instruction No. 2, and that said instruction wrongly affirms that defendant by its answer had admitted that the publication was of and concerning the plaintiff, when in fact the answer did not make such admission, we will add the following to what has been said. Defendant's answer in the respect here involved is not as clear as could be wished. It, in terms, admits it published the article as set out in the petition, but denies that it was false or defamatory, or that it was a libel on plaintiff; "and denies each and every other allegation in plaintiff's petition." And "that said article so published by it is substantially true in so far as it refers to plaintiff; that is, it is true, as stated in said article that plaintiff did maintain a baby farm" etc., setting out a small part of the publication which defendant insists was all which concerned the plaintiff. Instruction No. 2 does state, in effect, that defendant pleads, or admits, that all the statements in the publication are true, and that they were made *of and concerning the plaintiff*. So this last clause, thus embodied in the instruction, is erroneous; for it, in effect, states that defendant admits that the whole article was of and concerning the plaintiff.

But there is no rule oftener stated than that though an instruction contains error, the judgment will not, for that reason, be reversed if it be manifest that the error was harmless.

It is clear that notwithstanding the court erred in stating defendant admitted that the entire article referred to plaintiff, yet, if in point of fact, the entire article, in all material respects, without ambiguity, did refer to plaintiff and, upon its face, showed it was published "of and concerning" her, then no harm could result from stating that defendant admitted it.

We will therefore proceed to inquire whether other parts of the article than the part confessed by defendant, did undoubtedly and unequivocally refer to plaintiff. The entire article as published, is set out in Judge Johnson's opinion and it seems to us need only to be read to show, without ground for difference of opinion, that it referred to plaintiff. In the first place the article is headed in capital type that a baby farm had been "found" in an apartment. That plaintiff and a doctor were arrested and that the "woman was well known to the police" and that she or they (no difference which) "Formerly ran a home for babies on west side." That (partly in capital type): "BODIES OF SIX INFANTS FOUND IN KANSAS CITY SEWERS RECENTLY. UNABLE TO TELL THE POLICE HISTORY OF ANY CHILD IN HER CHARGE; WOMAN DENIES RESPONSIBILITY FOR DEATH OF CHILDREN; ONE BABY DEAD; ANOTHER DYING AT ST. ANTHONY'S HOME.

"Pursuing their investigations into the finding of six dead babies within the last few months in sewers in the neighborhood of Thirteenth and Fourteenth and Harrison Streets, the police last night went into the apartments of Mrs. Mary Rail, alias Miss Chardis Lundin."

Then after stating that plaintiff and the doctor were arrested on a charge of violating a city ordinance governing the birth and death of infants, there is a subheading in capital type, viz., "DENIES KNOWLEDGE OF OTHERS FOUND DEAD," followed by this: "When questioned about the bodies of the six babies taken from the sewers in that neighborhood during the last few months, the woman said she knew nothing about them. She refused to tell the officers of any persons with whom she had found homes for the little ones left in her care. She would not give the history of any particular baby—where she got it, what she did with it, who was its mother or who had adopted it. Nothing that she said served to clear up the mystery which the police have been working upon for

many months." Then after reciting matters tending to discredit her alleged story to the police, it is said that she "formerly operated a baby farm at 1735 Washington Street. The *police knew about her then* but she was never molested. More than a year ago the woman moved to the Tencrede Apartments, at 1515 Harrison Street, but it was not suspected until recently that she was again trafficking in babies." Then after describing the apartment, it is stated in the article that persons in other apartments in the house never saw plaintiff "taking babies in or out, they said, and the police supposed she transported the babies at night by way of the back stairs."

In the light of these quotations, it is not seen how anyone can say, and be in earnest about it, that the article did not refer to plaintiff. But the argument accompanying defendant's motion for rehearing seems to imply that if a defendant denies anything, no matter if it is a denial that there are seven days in a week, plaintiff must prove it. A denial of anything which may be questioned does call for proof. But denial of a patent fact, appearing on the record does not. Here the face of defendant's answer conceding that while containing a denial that any but a small part of the article concerning her arrest, referred to plaintiff, admits it published the article and asserts that it was true. So that, as above intimated, the only thing left to consider outside this, is to ascertain if such article on its face, without ambiguity, referred to plaintiff. And having found that it did, the error in plaintiff's instruction was harmless.

That part of the publication which defendant in its answer admitted had reference to plaintiff was a statement of the fact of her keeping a baby farm and her arrest for violating a city ordinance relating to the births and deaths of children. This we readily concede was privileged, relating, as it did, to a public court proceeding. There is thus left the question whether the remaining part is libelous *per se*. The statute (sec. 4818, R. S. 1909) defines a libel to be, "A malicious

defamation of a person made public by any printing tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse," It will be seen by reference to the article pleaded, as set out in Judge Johnson's opinion, that innuendoes are set forth whereby it was alleged that defendant intended to be understood as charging plaintiff with crimes, including murder. But it appears that at the trial these were abandoned by the plaintiff and the case left to stand upon the words of the publication free from explanation. The law is that if the words published are libelous without the aid of an innuendo, then matter of innuendo pleaded may be treated as surplusage. [Callahan v. Ingram, 122 Mo. 355; Julian v. Kansas City Star, 209 Mo. 35, 91; Cook v. Globe Democrat Printing Co., 227 Mo. 471, 526.]

In considering whether the article, stripped of the innuendoes, was libelous *per se*, we should treat plaintiff as innocent of the statements published of and concerning her and then answer, not whether she was charged with a crime for that is not a necessary requisite to libel, but whether such statements would, in the language of the statute, tend to expose her to public hatred and contempt, or to deprive her of the benefits of public confidence, or social intercourse. If they do, they are actionable. [Cook v. Globe Printing Co., 227 Mo. l. c. 529; Starkie on Slander & Libel, 231, 232.] Manifestly, the article cast suspicion upon plaintiff as one who threw bodies of babies into sewers, if not herself murdering them, and that she was so suspected by the police. That she was known under an *alias*; that she was what was known as a police character and that she trafficked in motherless babies, carrying them in and out of her house by back stairs in the nighttime. If this was not true, it would be difficult to state a more aggravated libel.

Plaintiff's instructions are attacked by defendant, especially No. 2 and, as already stated, it was for some

supposed fault with them that the trial court granted a new trial. We think that save in the respect we have ruled to be harmless, instruction No. 2 is correct. It required defendant to prove the truth, not of *all* the statements complained of and published, whether material or not, but of all the statements "found from the evidence to be false and a libel upon plaintiff." That is held to be a correct proposition of law. [Cook v. Globe Printing Co., 227 Mo. 471, 531; Meriwether v. Knapp Co., 120 Mo. App. 354, 385, 386.] In this respect the instruction is different from that condemned in Reynolds v. Knapp & Co., 155 Mo. App. 612, 618.

But here again appears defendant's dominating idea that since it denied that the article referred to plaintiff except the small portion of it set out in the answer, and since it justified as to that small part, therefore the cases just cited were not applicable. But defendant's denial in connection with its admission, we have already shown amounts to no more than if it should deny the alternation of the seasons. It admitted it published the whole article and alleged the whole article was true, but denied that it referred to plaintiff, except in the part concerning the baby farm and the arrest. We have already shown that its denial was in the face of the patent fact that the balance of the article, in all material respects, did refer to plaintiff. Hence, so far as it concerns the result, defendant is in the exact position it would have been had it admitted that the whole article, in all material respects, referred to plaintiff and justified by alleging, as it has, that it was the truth.

Plaintiff's first instruction is a correct statement of the law and what we have said shows it was properly given in this case.

It follows that the judgment must be reversed and the cause remanded with directions to set aside the order granting a new trial and to enter judgment for plaintiff in accordance with the verdict. *Johnson* and *Trimble, JJ.*, concur in separate opinions.

Caenefelt v. Bush.

TRIMBLE, J. (concurring)—I concur in the foregoing opinion with the observation that the article so clearly and obviously refers to plaintiff in its entirety, and, in the parts outside of those claimed to be privileged and sought to be justified, is libelous *per se*, the instruction should not be considered as harmlessly erroneous but as not erroneous at all.

ON REHEARING.

JOHNSON, J.—I concur in all that is said in the foregoing opinion on rehearing except the statement that the answer does not admit the whole article was published of and concerning plaintiff and that it was error, but harmless error, for plaintiff's second instruction to say that it did. Since as we have found the whole article is libelous, *per se*, and obviously refers to plaintiff in its entirety, and the answer admits its publication, it must follow that such admission included an admission that the entire article—not merely culled out parts thereof—was published "of and concerning plaintiff." There is no error, harmless or otherwise, in instruction number two, nor in any of the other instructions given at the request of plaintiff, and the motion for new trial should not have been sustained.

CHARLES CAENEFIELT, Respondent, v. B. F.
BUSH, Receiver of THE MISSOURI PACIFIC
RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 31, 1917.

1. **NEGLIGENCE: Personal Injuries: Railroads.** Plaintiff, an employee of a grain elevator company, was assisting in putting grain cars on a scale, which was being done by means of a power plant in the elevator which operated a cable. There were three cars to be moved, one empty, the other two loaded. The cable was fastened to

the cars by attaching the end to a U-bolt on the last or rear car. The U-bolt pulled out and the cable hook struck plaintiff injuring him. He sued the railroad company. It was *held* that the demurrer to the evidence should have been sustained.

2. ———: **Unwarranted Use of Appliance.** Where it is shown that a U-bolt on a box car is placed thereon only to be used to pull that car alone and that when the plaintiff, an employee, not of the railroad company, but of an elevator company, was injured, they (elevator employees) were undertaking to move three cars, the U-bolt thereby subjected to a use for which it was not intended, plaintiff cannot recover damages from the railroad company.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird*, Judge.

REVERSED AND REMANDED.

White, Hackney & Lyons for appellant.

Haff, Mersevey, German & Michaels for respondent.

BLAND, J.—This is an action for damages for personal injuries. Plaintiff recovered a judgment for thirty-two hundred and fifty (\$3250) dollars, and defendant has appealed. Defendant urges that his demurrer to the evidence offered at the close of the entire evidence, should have been sustained.

The evidence shows that on October 7, 1915, plaintiff was employed by the Western Grain Elevator Company at its elevator in Kansas City, Missouri, in the work of assisting in the setting of cars, containing grain, on scales to be weighed. The grain company had in use for sometime prior to the accident a contrivance for the pulling of cars upon the scale. This contrivance consisted of a power plant in the basement of the elevator which operated a cable and hook, the hook was on the opposite end of the cable from the power plant and was used to fasten on to cars for the purpose of pulling the latter on to the scales. It was the practice to fasten this hook on a convenient part of the car, and when a car had a U-bolt fastened to its side, as the car involved in this case had, the hook attached to the end

of this cable was hooked into the U-bolt. The evidence further shows that the contrivance used by the elevator company was such that it was necessary to pull two or more cars at one time in order to get the front car, or the car to be weighed, upon the scales, and to attach the hook to the last or rear car.

At the time plaintiff was injured he and his fellow workmen in the employ of the elevator company were pulling three cars, each from 36 to 40 feet in length. These cars had been consigned to the elevator company and had been set by defendant on sidings at the elevator for unloading. The first car, which was on the scales, was an empty car and weighed about 38,000 pounds. The second car was loaded with grain that had a net weight of 83,840 pounds. The third car to which the cable and hook were attached to the U-bolt was likewise a car loaded with grain having a net weight of 77,700 pounds. The U-bolt was a hook shaped somewhat like the letter U, made of a piece of round iron having a diameter of about one and one-fourth inches; it was about six inches across the part parallel to the side of the car and extended out about three and a half inches from the car. It was attached to the iron sill of the car by means of nuts fastened to the two prongs of the U-bolt which were run through the holes in the sill. The nuts were screwed to these prongs on the inside of the sill. That part of the U-bolt exposed and on the outside of the sill was larger than the portion going through the sill, making shoulders in the U-bolt which fitted tightly up against the sill. The nut on the front prong of the U-bolt, or on that side of the bolt that the pull was on, was gone.

At the time plaintiff was injured he had placed the hook into the U-bolt and the cars had been moved forward from three to five feet when the nut on the rear prong of the U-bolt gave away and the U-bolt pulled out, causing the hook to strike plaintiff on the right leg, breaking the latter. An examination of the U-bolt after the accident showed it to be twisted out of shape. Its shape was perfect before the accident.

The negligence alleged in the petition was "that the said lug, or hook, on said car was out of repair and defective . . . that defendants negligently failed and neglected to inspect said car and said lug or hook as it was their duty to do and that if the same had been inspected by defendants, the fact that it was out of repair and the defective condition thereof, as heretofore set forth, would have been discovered by defendants; and defendants negligently permitted the said lug or hook on said car to get out of repair and to be and become defective as in the respects heretofore alleged."

The evidence further shows that the U-bolt was placed upon the car for the purpose of pulling its own car and none other. Defendant urges the point that plaintiff, and the elevator company that employed him, were using the U-bolt for the pulling of more than one car or for a purpose for which it was not intended, and we think under the undisputed evidence in this case this to be the fact. However, plaintiff attempted to escape the consequence of this by showing that the elevator company had been hauling cars in this manner for several months before the accident, and, in fact, had hauled as many as twelve cars at one time by means of these U-bolts, and defendants during this time had several car inspectors stationed within seventy-five feet of the elevator. It cannot be said that even though the U-bolt was being used for a purpose not intended, this fact had come to the notice of defendants and for that reason the defendants should have furnished a U-bolt sufficiently strong and secure to pull the number of cars being hauled at the time of the accident.

Defendant was under no obligation to furnish a U-bolt. There was testimony that only four railroad companies in the United States had U-bolts of this nature on their cars and that such bolts are put on merely for the convenience of the customers of the railroad. It was shown that on cars not provided with U-bolts the elevator company hooked upon various parts of such cars in accordance with its own convenience. This is not a master and servant case where the master was

required to furnish the appliances for one purpose and the servant was using it for another and subjecting it to an additional strain to that which it was intended, and the master had impliedly assented to the perverted use. In such a case the master would be in complete control of the servant and the appliance, even having the right to remove the servant for disobedience. In the case at bar plaintiff was a servant of the elevator company, the consignee, and was not the servant of the railroad company. The duty the railroad company owed plaintiff in furnishing appliances was to furnish only a suitable one for the purpose intended. While it is true it was shown that the nut on the prong of the U-bolt on the pulling side was gone, and that this side gave away first, nevertheless, the evidence all shows that this clearly was not such a glaring defect that one could say without further evidence that there could be no question but that the U-bolt was insufficient to haul one car. The U-bolt held until the three cars were moved and showed by its appearance after the accident that a tremendous strain had been put upon it.

It may be stated that defendant urges with a great deal of plausibility that the overload on the U-bolt was the sole cause of its giving away and that the absence of the nut on the front prong had nothing to do with the accident. This argument is based on the fact that no one saw the U-bolt give away and an examination of it after the accident showed that the twists found in it had taken such peculiar directions that defendant says, with some apparent force, that the rear prong gave away first and that, consequently the absence of the nut on the front prong had nothing to do with the pulling out of the U-bolt. However, in view of the finding of the jury we may assume that the front prong gave away first but we may not assume from this that the overload was not the cause of the giving away of the U-bolt.

We will not say whether under the circumstances it may have been the duty of defendant to warn plaintiff or his employer of the defect in the U-bolt, even

though they were putting it to a use for which it was not intended, as no such case is made under the pleadings. We are unwilling to say that because a railroad company knows that a consignee is putting an appliance to a use not intended that the former must furnish another appliance to meet the requirements of the new and unauthorized use. It might be that a railroad company would be liable for an injury caused by an appliance that was intended for one particular purpose and was being used for another, if some custom were shown in reference to the matter. However, in this case there was no showing as to what length of time U-bolts of this kind had been used upon cars or that anyone else aside from plaintiff and the elevator company was using these U-bolts for a purpose not intended. There is nothing in this case to show anything that approached a custom on the part of patrons of this or other railroad companies to use U-bolts for the purpose which the one in controversy was used by plaintiff and his employer.

However, plaintiff urges that defendant in his instructions submitted to the jury the question whether the U-bolt was or was not sufficient to haul the one car upon which it was attached, and as the jury found for the plaintiff the jury necessarily found that the U-bolt was not sufficient for that purpose. Of course defendant was forced into this position on account of the ruling of the court on his demurrer. There is no evidence in the record from which the jury could say whether or not the U-bolt was sufficient for the purpose of hauling the car to which it was attached; such a finding on the part of the jury was a mere speculation. [Trigg v. Ozark Land & Lumber Co., 187 Mo. 227; Goransson v. Mfg. Co., 186 Mo. 300; Warner v. Railroad, 178 Mo. 125; Spiro v. Transit Co., 102 Mo. App. 250.]

The demurrer to the evidence should have been sustained.

The judgment is reversed and the cause remanded. All concur.

LUTHER TALBERT et al., Respondents, v. GEORGE GRIST, Appellant.

Kansas City Court of Appeals, January 28, 1918.

1. **WARRANTY DEEDS: Breach of Covenant: Unincorporated Companies.** A, who had no title, conveyed by a general warranty deed real estate to B, and B by a like deed conveyed the property to C, an unincorporated company; and C by a like deed conveyed the property to D. *Held*, that the deeds from B, to C and C to D were void and persons dealing with C were not estopped to deny its existence as a corporation, as there was no intention on the part of C to obtain from the Secretary of State a charter. But a suit having been brought by the heirs of B against D to try the title and D in his answer having set up that he had the title by reason of the conveyances from B. to C and from C to D, and the court having found for the defendant, and there having been no appeal, A in a suit on his covenant of indefeasible seizin contained in his deed to B is not in a position to say that D and his privies have not such rights in the real estate under the various conveyances that he may not sue A upon the covenant contained in the latter's deed.
2. ———: ———: **Grant, Bargain and Sell.** The words "grant, bargain and sell" used in a warranty deed are, under section 2793, Revised Statutes 1909, covenants of warranty and for quiet enjoyment, and against incumbrances, as well as seizin, which run with the land, and they may be sued upon by any subsequent grantee who sustains a loss by failure or defect in the title.
3. ———: **Equity: General Relief.** In an action brought under section 2535, Revised Statutes 1909, the court may hear and finally determine any and all rights, claims, interests, liens and demands whatsoever of the parties, or any one of them, concerning or affecting real property and may award full and complete relief, whether legal or equitable, and the relief provided in sections 2401, 2403, 2404 and 2405, Revised Statutes 1909, may be granted to defendant in the same suit.

Appeal from Schuyler Circuit Court.—*Hon. N. M. Pettingill*, Judge.

AFFIRMED.

C. C. Fogle and *R. E. McKee* for appellants.

Campbell & Ellison and *Rolston & Rolston* for respondents.

BLAND, J.--On October 13, 1894, Sarah E. Wales purchased and owned in fee simple the title to the south half of Block Fourteen (14), Colorado City, otherwise described as Lots Four, (4), Five (5), Six (6), Seven (7), Eight (8) and Nine (9) in Colorado City, Schuyler County, Missouri. The property was afterwards taken into the village of Greentop. Sarah E. Wales died intestate owning this property, leaving her husband, George W. Wales, her sons, John P. Wales and Harry Wales, and a grandson, Virgil Fowler, as her sole and only heirs. George W. Wales moved to Iowa and took with him his sons. The taxes upon the land became delinquent, the property was afterwards sold for the same and a sheriff's deed was made on May 11, 1903, conveying the property to defendant, George Grist. This tax deed was void and conveyed no title to said Grist. George Grist conveyed these lots by a warranty deed, regular in form, dated May 18, 1903, to Wallace Wilson, who took possession of the premises under such deed, claiming in good faith the title thereto. By a warranty deed regular in form, dated June 29, 1908, Wallace Wilson and his wife conveyed the property to the Greentop Telephone Exchange and its successors. This company was an unincorporated company and there was evidence that it was intended that it should become a corporation. Said company (or the members composing it) likewise went into the possession of the property and claimed in good faith the title thereto under said deed. By a warranty deed, regular in form, dated February 12, 1913, the Greentop Telephone Exchange by Luther Talbert, James Young and R. W. Hart, directors, conveyed the property to Harry A. Buchanan and Frank B. Farrington, who went into possession thereof claiming in good faith the title thereto, and on February 16, 1915, Buchanan and Farrington and their wives conveyed to plaintiffs Lots Four (4), Five (5), Six (6), Seven (7) and a portion of Lot Eight (8), being in the south half of Lot Fourteen (14), of Colorado City; the latter likewise went into possession thereof claiming, in good faith, the title thereto.

On February 16, 1915, the heirs of Wallace Wilson, claiming through him brought a suit against the Greentop Telephone Exchange and Talbert, Young and Hart, its directors, and Buchanan and Farrington to try the title to said property. The answer in said suit set up that the Greentop Telephone Exchange purchased the property from Wallace Wilson and wife, who, by their warranty deed and in consideration of six hundred and fifty (\$650) dollars, conveyed said premises to the Greentop Telephone Exchange and its successors, and that said Greentop Telephone Exchange by its directors, Talbert, Young and Hart, by a warranty deed, and in consideration of six hundred (\$600) dollars, thereafter conveyed the property to Buchanan and Farrington. The court by its judgment in said suit, apparently rendered on the same day that the suit was filed, found the title to the property to be in said Buchanan and Farrington.

On August 23, 1915, the heirs of Sarah E. Wales brought suit against Buchanan and Farrington and Virgil Fowler, the latter being a minor heir of said Sarah E. Wales, asking the court to determine the title to the property claimed by the defendants therein, as provided in section 2535, Revised Statutes 1909, and on August 31, 1915, said heirs of Sarah E. Wales, deceased, brought a like suit against these plaintiffs, the Greentop Telephone Exchange, and other persons, asking the court to try the title to the property conveyed by Buchanan and Farrington to these plaintiffs as aforesaid. Before these suits were tried a guardian *ad litem* was appointed for the minor defendant, Virgil Fowler. Thereafter the defendant herein was served with notices signed by these plaintiffs Greentop Telephone Exchange, and Buchanan and Farrington, notifying this defendant that said suits had been brought and requesting that this defendant come in and defend the title as he was required to do by virtue of the covenant and warranty contained in his said deed to Wallace Wilson, dated May 18, 1903. This defendant failed to appear or defend these suits but the de-

fendants therein filed their answers and on a trial judgments were rendered therein that the plaintiffs and defendant, Virgil Fowler, were entitled to the property subject to the improvements, and that "certain improvements were put on said lots by said defendants, in good faith, and without any knowledge on their part of any title or claim to said lots on the part of said plaintiffs and Virgil Fowler, and while said defendants were holding and claiming the said lots, adversely to said plaintiffs and Virgil Fowler." That the value of said lots, without such improvements, including, rents accrued was nine hundred and seventy-five (\$975) dollars, and that the value of said lots, including said improvements was four thousand, eight hundred and seventy-five (\$4875) dollars. The court then ordered that upon the payment of nine hundred and seventy-five (\$975) dollars to plaintiffs and Fowler, defendants should have and hold the fee-simple title to said lots, and said payment was so made.

On January 4, 1917, this suit was brought by plaintiffs for damages incurred by reason of said suits brought against these plaintiffs and Buchanan and Farrington (plaintiffs being the assignee of the latter's claim) for breach of this defendant's covenant and warranty as contained in his said deed to Wallace Wilson. The cause was tried before the court and judgment was rendered in favor of plaintiffs, and defendant has appealed.

Defendant's first point is that plaintiffs had no right to sue upon defendant's covenant and warranty contained in his deed to Wallace Wilson, for the reason that the Greentop Telephone Exchange was an unincorporated company and that the conveyances by Wilson to it and from it to Buchanan and Farrington were void. To support this contention defendant relies upon *Douthitt v. Stinson*, 63 Mo. 268; *Reinhard v. The Virginia Land and Mining Co.*, 107 Mo. 616, and *The White Oak Grove Benevolent Society v. Murray*, 145 Mo. 622. These cases sustain defendant's contention that the deeds from Wilson to the Greentop Telephone

Exchange and from the latter to Buchanan and Farrington were void. Nor can persons dealing with such a company be estopped to deny its existence as a corporation. The general rule is that where a person has contracted and dealt with another as a corporation, that he and his privies will be estopped, in a proceeding wherein such dealings are an issue, to deny the existence of the corporation. This rule does not extend to a case where no charter has been obtained from the Secretary of State and there has never been an intention to obtain such a charter. [Elliott v. Sullivan, 156 Mo. App. 1. c. 507; Douthitt v. Stinson, *supra*; Reinhard v. The Virginia Land and Mining Co., *supra*; The White Oak Grove Benevolent Society v. Murray, *supra*; Bradley v. Reppell, 133 Mo. 545; West Missouri Land Co. v. Railway Co., 161 Mo. 595.] However, we do not believe that the fact that those deeds were void deprives plaintiff in this case of the right to sue on the covenant of indefeasible seizin contained in defendant's deed. As before stated on February 16, 1915, the heirs of Wallace Wilson (Wallace Wilson was defendant's grantee in a deed the validity of which is not disputed) brought suit against the Greentop Telephone Exchange and Buchanan and Farrington. There was a final judgment rendered in that case which, in effect, determined that all the interest of Wallace Wilson or his heirs in the land was then owned by Buchanan and Farrington. This judgment was binding on the parties therein and their privies whether or not the court rendered the same on erroneous conclusions of law, and the parties thereto and their privies were not in a position to thereafter urge that the deeds from Wilson to the Greentop Telephone Exchange and from the latter to Buchanan and Farrington were void deeds. The loss having fallen upon these plaintiffs the covenant in defendant's deed inured to them. [Dickson v. Desire's Adm'r, 23 Mo. 151; Iowa Loan and Trust Co. v. Fullen, 114 Mo. App. 1. c. 638.]

The words, "grant, bargain and sell" used in a warranty deed are, under section 2793, Revised Statutes

1909, covenants of warranty and for quiet enjoyment, and against incumbrances as well as of seizin, which run with the land, and that they may be sued upon by any subsequent grantee who sustains a loss by failure of or defect in the title, has been settled by many decisions of our courts. [Staed v. Rossier, 157 Mo. App. l. c. 308, and cases therein cited.]

It is said in *Allen v. Kennedy*, 91 Mo. l. c. 329:

"As to the covenant of seizin of an indefeasible estate in fee-simple, the claim is, that this covenant, if broken at all, is always broken when made, and does not run with the land. Whatever may be the rule elsewhere, with us it is more than a covenant in the present tense. It is rather a covenant of indemnity, and it has often been held that it runs with the land to the extent that if the covenantee takes any estate, however defeasible, or if possession accompanies the deed, though no title pass, yet, in either event, this covenant runs with the land and inures to the subsequent grantee, upon whom the loss falls. [*Dixon v. Desire*, 23 Mo. 515; *Chambers v. Smith*, 23 Mo. 174; *Maguire v. Riggis*, 44 Mo. 512; *Jones v. Whitsitt*, 79 Mo. 188.]"

It will be noted that this is not a suit upon a covenant in void deeds, that is, the deeds from Wallace Wilson to the Greentop Telephone Exchange and from the latter to Buchanan and Farrington, but a suit upon covenants in the valid deed from the defendant to Wilson.

Defendant urges that the plaintiffs herein are not entitled to recover damages in this suit for the reason that the court, in the suits brought by the Wales heirs against plaintiffs and Buchanan and Farrington, erred in considering the question of improvements and allowing the same to the defendants therein. The reason given for this claim is that those suits were brought to determine the title to the property and no relief other than to ascertain and determine the title was mentioned in the pleadings, nor was defendant notified of the pendency of any other character of suits except those brought to determine the title. While the statute under

which these suits were brought, section 2535, Revised Statutes 1909, provides that "upon trial of such cause, if the same be asked for in the pleadings by either party, the court may hear and finally determine any and all rights," etc., and there was nothing in the pleadings in those cases asking for an allowance for improvements, nevertheless, it is quite evident that those cases were tried upon the theory that such relief was requested as it was granted by the court in its judgments. Had the defendant been present and defended those suits, as he was in duty bound under his covenant and warranty, he might have made objection then as to the theory upon which the case was being tried. Not having been present he is now estopped from saying that the case was not properly tried and he is bound by the judgments of the court in those cases awarding the improvements to the defendants therein. [Leet v. Gratz, 92 Mo. App. 422.]

We are also of the opinion that defendant cannot complain that the notices served upon him did not state that the court would be asked to allow plaintiffs in those cases the improvements. The notices served on the defendant notified him that suits had been commenced to try the title to the land, that is, suits as provided under sections 2535 and 2536, Revised Statutes 1909. Under the provisions of these sections we think it apparent that the court may award the relief provided for under sections 2401, 2402, 2403, 2404 and 2405, Revised Statutes 1909. (This last section provides that in certain contingencies the defendant may take the land and pay plaintiff therefor). While the relief provided for in sections 2401 et seq. cannot be granted in an ejectment suit but must be obtained in a separate suit brought after judgment for plaintiff in the ejectment case (*Dawkins v. Griffin*, 195 Mo. l. c. 438; *Jasper County v. Wadlow*, 82 Mo. 172; *McClannahan v. Smith*, 76 Mo. 428), the suits by the Wales heirs were not suits in ejectment. Section 2535, Revised Statutes 1909, under which these actions were brought provides that "the court may hear and finally determine any and all rights,

claims, interests, liens and demands whatsoever of the parties, or anyone of them, concerning or affecting said real property, and may award full and complete relief, whether legal or equitable." This statute is very broad in its terms and as it is highly remedial and beneficial in its purposes it should be given a very liberal construction. [Ball v. Woolfolk, 175 Mo. l. c. 285; Garrison v. Frazier, 165 Mo. l. c. 46.] One of the objects of this statute is to give a right of action to any person claiming an estate in lands and to permit a defendant to set up any defense he may have and to ask for and have litigated any relief the law gives him. We believe that these notices served upon the defendant fully covered suits wherein the value of the improvements were awarded to the defendants. Section 2100, Revised Statutes 1909, has no application to notices of this kind.

Aside from this we do not believe that defendant in this case can complain of the action of the court in awarding the improvements to the defendants in those cases, for the reason that it was to the distinct advantage of the defendant herein that the defendants in those cases saved the value of the improvements instead of permitting plaintiff in those cases to recover the land and improvements. Defendant's contention that the defendants in those suits were not evicted because they retained the land and improvements after paying for the former is not well taken. [Magwire v. Riggin, 44 Mo. 512; Leet v. Gratz, supra.]

In the suits brought by the Wales heirs against plaintiffs, Greentop Telephone Exchange, and Buchanan and Farrington, the court found and adjudged that the minor, Virgil Fowler, was the owner in fee of one-fourth of the real estate and further found the value of his interest and adjudged and decreed that he be divested of the title and that the defendants therein be vested with the same upon the payment of plaintiffs (therein) attorney's fees and the amount found to be the value of their interest in the land.

Defendant claims that the court had no power to do anything further than to adjudge said minor to be

the owner of an undivided one-fourth interest in the property, and that the minor could be divested of such title, (if at all) only by and through the probate court, citing Leet v. Gratz, supra. In that case the devisees of one Martin J. Gannon had brought suit in ejectment against Leet (the plaintiff in the case of Leet v. Gratz) and the devisees had recovered possession of the land in said ejectment suit, thereafter Leet, the defendant in the last-named suit, compromised the same for five hundred (\$500) dollars, which was paid to the adult devisees and to the curator of the minor devisees. The curator of the minors attempted to carry out said compromise agreement by conveying, under an order from the probate court, the interest of such minors to Leet. The circuit court then adjudged that the title be out of the minors and be in the defendant, Leet. The defendant in that case, Leet, then brought suit against Gratz on his covenant of seizin and warranty and the court held (Leet v. Gratz, supra) that Leet could not recover the amount he paid to the guardian of the minors as there was no power given by the law to any court to order the sale of land to minors to compromise a litigated claim. However, we do not believe that that case (Leet v. Gratz, supra) is in point on the question before us in this case. In the suit by the Wales heirs there was no effort made to compromise with the guardian *ad litem* of the minor, Virgil Fowler, and to buy his title for a consideration. The court tried these suits under the provisions of sections 2535, 2536 and 2401 et seq., Revised Statutes 1909. There is nothing in those sections providing that the court shall not exercise the powers conferred therein in cases where one of the parties to the suit is a minor. The minor, Virgil Fowler, was represented in those suits by his guardian *ad litem*, and there can be no doubt but what the court, exercising the powers conferred upon it by said sections of the statutes, had a right under section 2405, Revised Statutes 1909, to order that the defendants in those suits take the land and pay the ascertained value thereof to the owners thereof.

The deed from Grist to Wilson was for land in Colorado City, originally a town in Schuyler County, Missouri. The suit of the Wales heirs involved the title to land in Colorado City, an addition to the original town, now the village of Greentop, in said county and State. Defendant urges that there was no evidence that the said tracts were identical and that oral evidence introduced to show the identity of the two tracts was not admissible. These points are ruled against the defendant. The identity of the two tracts might be shown by parol. [Hubbard v. Whitehead, 221 Mo. 672; Wilcox v. Sonka, 137 Mo. App. 54.]

The court properly permitted the witness, Hart, to testify as to the actual consideration in the deeds offered in evidence to show the value of the premises at various times. The amount paid by the grantees in these deeds was a proper issue in the case and the consideration as named in the deeds might be shown to have been other than that named. [Leet v. Gratz, *supra*; Allen v. Kennedy, *supra*, l. c. 328.]

The judgment is affirmed. All concur.

L. J. SMITH CONSTRUCTION COMPANY, Appellant,
v. W. C. MULLINS and SOUTHERN SURETY
COMPANY, Respondent.

Kansas City Court of Appeals, January 28, 1918.

1. **CONTRACTS: Warranty, Express or Implied: Leases of Personal Property.** A lease of machinery which provides that property was leased "in the present condition thereof" discloses an intention on the part of the parties that there should be no warranty express or implied.
2. ———: **Pleading: Fraud.** An action for rent and failure to return machinery in good condition, cannot be defended on the ground that the owner knowingly and fraudulently concealed the fact that the machinery was old, worn and out of repair when rented, where fraud was not set up in the answer. Such a claim must be pleaded.

Smith Const. Co. v. Mullins and So. Surety Co.

3. ———: **Evidence: Conclusions of Witnesses.** Questions propounded to witnesses and the answers thereto in language constituting conclusions or ultimate facts to be found by a jury are erroneous. Questions should call for a statement of facts on which the jury could draw its own conclusion.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner*, Judge.

REVERSED AND REMANDED.

McVey & Freet for appellant.

Fyke & Snyder for respondents.

BLAND, J.—On November 27, 1914, plaintiff, by a written lease, rented to defendant, W. C. Mullins, certain grading machinery consisting of a steam shovel, dinkey engines and dump cars. The property was to be used by said defendant in grading work located near the union station in Kansas City, Missouri. It was expressly provided in the contract that the machinery was leased *in the present condition thereof*. A bond was executed for the faithful performance of the contract on the part of defendant, Mullins, and signed by said defendant as principal and the defendant, Southern Surety Company, as surety. The machinery was delivered to defendant, Mullins, and he used the same in this work for several months. Mullins paid more than five thousand (\$5000) dollars on the rental of this machinery but did not pay all the rent stipulated to be paid in the contract. Plaintiff brought this suit for seven hundred, twenty-eight and 36/100 (\$728.36) dollars, the balance of the rent claimed to be due, and for three thousand, eight hundred and seventy-seven and 24/100 (\$3877.24) dollars and interest, which plaintiff claimed was due it by reason of the property not being returned to plaintiff as provided in the contract, that is, in as good condition and repair as when received, ordinary wear and tear excepted.

The answer on the part of Mullins consisted of an admission of the execution of the contract and a

general denial of all other matters alleged in the petition, and a cross-demand setting up that the machinery did not come up to an implied warranty that it was in reasonably good condition for the purposes for which it was leased and to an express warranty that the machinery was in first-class condition; that plaintiff fraudulently concealed from Mullins that the machinery was old, worn and out of repair and asked damages in the sum of seventy-five hundred (\$7500) dollars. The jury found for the defendants of plaintiff's petition and for plaintiff on said defendants' cross-demand, and plaintiff has appealed. There was no appeal on the part of defendants.

Plaintiff complains of an instruction given by the court which told the jury in effect that if they found from the evidence that the machinery was old and out of repair and not in a reasonably fit condition for the work and that defendant, Mullins, had paid plaintiff as rent all that the use of such machinery was reasonably worth considering its defective condition (if it was defective), then plaintiff was not entitled to recover any further sum on account of the rent of said engines and appliances. This instruction and similar instructions given on behalf of the defendants were based upon an assumption by the court that the question of express and implied warranty connected with fraudulent concealment were in the case, which plaintiff strenuously contends were not.

It is the contention of the plaintiff that because the contract provided that the machinery was leased "in the present condition thereof" there was an intention on the part of the parties that there should be no warranty either expressed or implied. We believe this contention to be well taken. The defendants seem to think that these words used in the contract did not show such intention. Defendants' construction of these words is that the contract warranted the machinery in its present condition to be reasonably fit and suitable for the work. We are required to give effect to all parts of the contract. To adopt defendants' construc-

tion of it would not be meeting this requirement but would be holding that the words quoted were meaningless and that the contract would be the same if they were not in it. We think that the words "in the present condition thereof" as used in this contract are equivalent to the use of the words "with all faults." When words of this kind are used the meaning of the contract is that the purchaser or lessor shall make use of his eyes and understanding to discover what defects there are, if any. When the vendee or lessee takes the article at his own risk, or with all faults or defects, the vendor or lessor is relieved from disclosing any faults he may know to exist in the thing sold or leased; the maxim *caveat emptor* then applies. However, the vendor or lessor is not to make use of any artifice or practice to conceal the faults or defects, or to prevent the purchaser or lessee from discovering faults which he, the vendor or lessor, knew to exist, for if the latter is guilty of such conduct it is fraudulent. [Smith v. Andrews, 30 N. C. 3; Whitney v. Bordman, 118 Mass. l. c. 247-248; 35 Cyc. 270.] As it clearly was the intention of the parties in the case at bar that the machinery was to be accepted in the condition in which it was, there could have been neither an expressed nor implied warranty as to its condition. [Iron Co. v. Holbeck, 109 Mo. App. l. c. 185; Boulware v. Mfg. Co., 152 Mo. App. l. c. 572; Overhulser v. Peacock, 148 Mo. App. 504; 6 Corpus Juris., pp. 1110, 1111.]

The action for rent and failure to return the machinery in good condition cannot be defended on the ground that the plaintiff knowingly and fraudulently concealed from the defendants that the machinery was old, worn and out of repair, for the reason that no fraud is pleaded in the answer. In order for defendants to take advantage of any such claim the same must have been set up in the answer. It is true that fraud is pleaded in the cross-action. The jury found for the plaintiff on defendants' cross-action. We do not say what effect this will have on defendants' right to set up the alleged fraud when the case is again tried, but it

is sufficient for us to say that, in view of the present state of the pleadings, there is nothing in the case permitting a defense on the ground of fraud of plaintiff's cause of action for rent and damage to the machinery.

Defendants produced witnesses to testify as to the condition of the machinery at the time it was re-delivered to plaintiff. These witnesses were asked to tell the jury in what condition this machinery was when it was re-delivered and were permitted over the objection of plaintiff to give their conclusions as to such condition. The questions and answers were in language constituting a conclusion or ultimate fact to be found by the jury and were, therefore, erroneous. The questions under the circumstances of this case should have called for a statement of the facts on which the jury could draw its own conclusion as to the condition of the machinery. [Iron & Equipment Co. v. Smith, 257 Mo. 226.]

For the errors noted the judgment will be reversed and the cause remanded. All concur.

ANNA GILSEY, Appellant, v. MAX GILSEY, Respondent.

Kansas City Court of Appeals, January 28, 1918.

- 1. **REVERSAL WITH DIRECTIONS: Jurisdiction.** When a judgment is reversed and cause is remanded with specific directions, the trial court has no other jurisdiction than to follow the directions given.
2. **DIVORCE: Alimony: Separation and Settlement: Fraud: Tender.** Where husband and wife enter into a contract of settlement and separation, in which all money and property rights and obligations are adjusted in consideration of the husband paying her a certain sum of money, she cannot then bring an action for divorce and alimony and seek to repudiate the contract without tendering back the sum received by her under the contract. Such state of case does not come within the exception that a tender need not be made when the party demanding it already owes the other party more than the sum which is claimed should have been tendered.

3. **CASE IN EQUITY: Tender.** In an equity case where the party offers to perform any and all orders, directions and judgments of the court, a tender need not be made, though in an action at law it would be necessary.
4. **DIVORCE: Action: Equity: Statutory.** An action for divorce where there has been a valid marriage is not an action in equity. Such actions were formerly within the jurisdiction of ecclesiastical courts; but having no such courts, jurisdiction in our courts is dependent upon the statute and the action may be said to be statutory.
5. **TENDER: Pleading: Judgment.** Where a tender is requisite to maintaining a cause of action and none is pleaded, judgment may be rendered on the pleading.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner*, Judge.

AFFIRMED.

Frank Yalman, J. M. Johnson and J. D. Hill for appellant.

Paul R. Stinson for respondent.

ELLISON, P. J.—Plaintiff and defendant were married in October, 1905, by common-law contract. Finding that they could not live together they, on the 5th of March, 1914, entered into an agreement of separation and settlement, wherein it was recited that as it was "impossible for them to continue to live together as man and wife," it was agreed therein they would separate, and that plaintiff would "accept the sum of five thousand dollars in full settlement of all property rights and dower interest in and to all sums of money and interests in any and all personal properties, real estate, stocks and bonds that may be due" from defendant to plaintiff "by law or contract, is hereby settled in full."

On the 23rd of December, 1914, plaintiff filed the present action for divorce and alimony. Defendant made answer in which he pleaded the contract, claiming that he had complied therewith and that he was thereby released from any obligation for alimony. Plaintiff filed a reply

to such answer in which she charged that the contract was procured from her by fraud and duress and that she was therefore not bound by its terms; but she did not plead a return, or offer to return, what she received from defendant.

The trial court granted plaintiff a decree of divorce in which it allowed plaintiff three thousand dollars alimony and two hundred dollars attorney's fee, and refused to consider the contract aforesaid, on the ground that defendant had not properly pleaded it; and held that even if the contract were properly pleaded, it did not relieve defendant from his obligation to pay alimony.

Defendant acquiesced in the decree for divorce but appealed from the allowance of alimony and attorney's fee, on the ground that the contract should be considered and held to bar alimony. The case will be found reported in 195 Mo. App. 407.

We there held; in an opinion by BLAND, J., that considering that the reply to defendant's answer took issue on the contract and pleaded that it was procured by fraud and duress, it was not correct to say that it was out of the case as not being properly pleaded. It was further held, contrary to the view of the trial court, that if the contract had not been procured by fraud and duress, it was a bar to alimony. The judgment was therefore reversed and the cause remanded that the issue made on the procurement of the contract might be tried, and if found to have been fraudulently obtained, alimony was to be allowed, but if there had been no fraud or duress, then alimony was barred.

The case came on again in the trial court when defendant filed a motion for judgment on the pleadings; that is, for judgment against alimony and attorney's fee. The motion was sustained on the ground that plaintiff had not pleaded in the reply that she had returned, or offered to return, the five thousand dollars received under the contract she sought to repudiate for fraud. Plaintiff thereupon appealed to this court.

Plaintiff has assigned two principal grounds for reversal of the judgment. First: That this court in re-

versing the judgment and remanding the cause, ordered a new trial on the issue of fraud and duress in procuring the contract, and therefore the trial court had no other power or jurisdiction and should not have entertained defendant's motion for judgment further than to have overruled it.

Second: That if the contract was procured by defendant through fraud and duress, plaintiff was not required to tender back the sums received under the contract, for the reason that a "fiduciary relationship" existed between the parties. And that it is not necessary to tender back the amount received under a contract where the party committing the fraud owed the other party more than the amount which could be tendered. And that the rule requiring tender does not apply to equity cases, where the prayer offers to do equity, or submit to such orders as the court might make.

And, lastly, that the question of tender had nothing to do with attorney's fees, an issue said to be left in the case regardless of alimony.

It is true, as stated by plaintiff, that where an appellate court reverses a judgment and remands the cause, with specific directions, those directions must be complied with, and if such directions dispose of the case, that ends the matter in controversy. [Rees v. McDaniel, 131 Mo. 681.]

But we think the opinion on the hearing when the the case was here before does not give any directions. It is true that we referred to another trial on the question of fraud by merely assuming it would be necessary, in the state of the case as made by our opinion, to have another trial. But it was not intended, nor did we cut off any right which the defendant might have arising out of the state of the pleadings. Nothing of that nature was suggested.

Nor do we think that there was any such "fiduciary" relation existing between these parties at the date of the contract that would relieve either, in an action at law, of the performance of any duty which is requisite to the right to assert a cause of action. It was said by the

Court of Errors and Appeals of New Jersey in deciding a case involving an antenuptial contract that the "husband, by his will, devised to the trustee named in the marriage settlement, and for her benefit, the sum of \$5000 provided in that instrument. Of that amount it was proved that the trustee has paid over to the appellant \$500. This \$500 she accepted from him, and still, retains. It is entirely settled that a party to a contract cannot, at one and the same time, repudiate it and retain a benefit from its partial execution. In order to entitle him to rescind he must first restore what he has received under the contract, and thus put the other party to the agreement in his original position. [Trenton Passenger Railway Co. v. Wilson, 11 Dick. Ch. Rep. 783; Byard v. Holmes, 4 Vr. 119; Behring v. Somerville, 34 Vr. 572.] This the appellant has not done, and consequently does not stand in a position which entitles her to an annulment of the contract, even if it be true, as she alleges, that she was induced to enter into it by fraud on the part of her husband." [Russell v. Russell, 63 N. J. Eq. 282, 284.]

Nor do we think the rule which exempts one from the duty of tender where the party to whom the tender is to be made already owes the other more than the amount claimed should be tendered (Girard v. Wheel Co., 123 Mo. 358; Goodson v. Masonic Assn., 91 Mo. App. 339, 352; Kingman-Moore Implement Co. v. Ellis, 125 Mo. App. 692) has application to this case; since here it is not known that defendant owed plaintiff more alimony (an unliquidated sum) than she got on the contract of settlement.

The point made that this is a case in equity would more seriously affect the defendant than those we have referred to if we believed it belonged to that branch of jurisprudence. For it seems in a case in equity where the party offers to do equity and submit to, and perform, such orders as the court might make as a condition to the relief he seeks, he need not make a tender before, or along with the bringing of the action. [Whelan v. Reilley, 61 Mo. 565, 569; Paquin v. Milliken, 163 Mo.

79; Haydon v. Railroad, 222 Mo. 126.] In other words, in a law case, tender on the face of the case made, is a requisite to its maintenance; but in equity if relief is asked on any conditions which the court may prescribe, thus putting it in the power of the chancellor to restore the *status quo* entirely, or so as good conscience may require.

But, as intimated, an action for divorce is not action in equity. It is expressly so decided in Chapman v. Chapman, 269 Mo. 663; Mangles v. Mangles, 6 Mo. App. 481; therefore plaintiff's effort to avoid the law concerning the necessity of tender as a requisite to recession, on the ground that the action is in equity must fail.

Formerly actions for divorce were not classed as either law or equity actions. Supervision of the marriage relation (where there had been a valid marriage) was claimed and held to belong to the ecclesiastical courts. In England the ecclesiastical law was taken largely from the "Roman Canon Law," but not altogether, and it was therefore called the "Kings Ecclesiastical Law."

While we brought the ecclesiastical divorce law from England we did not establish such courts here, and therefore we were in the predicament of having a law without an appropriate court to enforce it, the law thereby remaining in abeyance until the Legislature conferred jurisdiction on certain of our courts (see Barson v. Le Barson, 35 Vt. 365; 1. Bishop on Marriage and Divorce, Secs. 128, 129). In this State it was conferred on our common-law courts as distinguished from the equity side of such courts. This jurisdiction authorized the courts to grant divorces for the causes recognized by the ecclesiastical courts in England, if not incompatible with our institutions, unless, of course, the statute conferring the jurisdiction (as in this State) itself named the causes. It also took along with it the defenses and the practice and proceedings of such courts, unless interfered with by the statute. [Chapman, v. Chapman, 269 Mo. *supra*, l. c. 668; 1 Bishop on

Marriage and Divorce, Secs. 128, 129; 2 Ib, sec. 801.] Our courts, by this means, being governed by the practise of the ecclesiastical courts, we are led to inquire whether it would be permissible in an action for divorce in the latter courts for the wife seeking alimony, to repudiate and rescind her contract accepting a sum of money in lieu of such alimony, without first refunding, or offering to refund the money?

We are not advised of any instance where, in such circumstances, it has been allowed. No case of that kind has been cited. To permit it would seem to be grossly unjust, and in the absence of a precedent supporting such action, we will refuse to take it. [Russell v. Russell, 63 N. J. Eq. 282, 284.]

It is worthy of remark that plaintiff in attempting to rescind the settlement without restoring the money she received, did so by way of reply under the provisions of section 1812, Revised Statutes 1909, which contemplates a legal proceeding and would seem to leave her without any right to invoke the equity rule now brought forward. Furthermore the reply contains no allegations or offer which would authorize the application of equity practice. While now, by her motion, asking for herself consideration in equity, she has avoided offering to do equity and thereby fails to come within the rule stated in the authorities cited.

It is finally insisted that suit money in the way of attorney's fees was an issue in the cause which should have prevented the court from sustaining the motion. What we have said as to alimony finds application to this branch of the case. Besides, the face of the contract shows that plaintiff had sufficient means to make an allowance of suit money unnecessary and improper. [Smith v. Smith, 129 Mo. App. 99, 104; Bender v. Bender, 190 Mo. App. 572.]

Plaintiff having received the benefit of her contract with defendant, having no right to repudiate it on the ground of fraud, without offering to refund, should have pleaded a tender in her reply, and not having done so, the trial court properly rendered judgment on the

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pleadings. [Jarrett v. Morton, 44 Mo. 275; Althoff v. Transit Co., 204 Mo. 166, 170, 171; Wood v. Telephone Co., 223 Mo. 537, 563; Implement Co. v. Ellis, 125 Mo. App. 692, 696; Boehn v. American Patriots, 172 Mo. App. 104.]

The foregoing considerations result in affirming the judgment. All concur.

LURA O. SCOTT, Respondent, v. MARY M. DAVIS,
MARY MARSH, IRBY W. DAVIS and JOHN
STERLING ROYAL REMEDY COMPANY, a
Corporation, Appellants.

Kansas City Court of Appeals, January 28, 1918.

1. **CORPORATION: Expiration of Charter: Officers as Trustees.** Whenever the charter of a corporation expired by reason of the time mentioned in its article of incorporation having expired, the affairs of the company must be wound up as provided in section 2995, Revised Statutes 1909.
2. ———: **Equity.** But where those in control of the company do not thus wind up its affairs, but proceed to organize a new company with the assets and business of the old one without notifying any of the parties interested of any of the facts, equity, under the facts disclosed in this case, will place the latter in the same position in the new company that they held in the old company whose charter had expired.
3. **EQUITY: Pleading: General Relief.** Where sufficient facts are stated in a petition in equity to entitle plaintiff to relief, the particular relief asked may be disregarded and any relief consistent with the case made by the petition and with the issues may be granted.

Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney, Judge.*

REVERSED AND REMANDED (*with directions*).

H. F. Weiman for appellants.

John D. Meyers for respondent.

BLAND, J.—In 1884 a corporation to continue twenty-five years and known as “The John Sterling Royal Remedy Company” was organized under the laws of Missouri to manufacture and sell medicines. The capital stock consisted of five hundred shares. The charter expired in 1909, but without any knowledge of such expiration on the part of any of the parties concerned in the transactions herein discussed the company continued to do business until October, 1914. On October 8, 1912, one James W. Oldham owned four hundred and sixteen (416) shares of said capital stock and one Mary Weil owned the remaining eighty-four (84) shares. On that date said Oldham by contract in writing (hereinafter called the Oldham contract) sold to said Mary Weil all of his capital stock in the company for the sum of six thousand dollars (\$6000), of which sum said Mary Weil paid one thousand (\$1000) dollars in cash and was to pay the balance in monthly installments. To secure the deferred payments all of the capital stock of the company was surrendered and canceled and new stock was issued in the name of Mary Weil, who endorsed the same in blank and turned the certificates over to said James W. Oldham. These shares at the time of the trial were in the possession of the plaintiff, who was the assignee of said Oldham.

By the terms of the Oldham contract it was provided that in case Mary Weil made default in the payment of any sum of money when the same became due under said contract, that the said James W. Oldham then might declare the contract and all further right, title and interest of said Mary Weil in and to said certificates of stock terminated, save and except as to eighty-four (84) shares thereof, and that the said Mary Weil and all persons acting under her should at once resign from all offices in the corporation and deliver said corporation and all of its assets over to said Oldham; that all money theretofore paid to Oldham should be retained by him as liquidated damages.

Mary Weil, as provided by said contract, took possession of the corporation and of all its offices, assets and business, and the business of the corporation was thereafter carried on by her, and she, as long as she retained her interest, made the payments provided for in the contract as the same became due. In February, 1913, Mary Weil by a contract in writing sold to the defendant, Mary M. Davis, two-thirds of her interest in the company, and it was provided in said contract that the payments on the Oldham contract should be continued by said Mary Weil and Mary M. Davis. Shortly thereafter Mary Weil sold to Mary Marsh her remaining one-third of the stock and the latter sold this stock to Mary M. Davis. Mary M. Davis thereupon took possession of the corporation and its offices and assets, and the business was thereafter carried on by her and under her control until October 1, 1914, and up to that time all payments on the Oldham contract were met and paid by her.

In September, 1914, Mary M. Davis was notified by the Secretary of State that the charter of the company had expired. This was the first knowledge that any of these parties had of the expiration of the corporation. Thereupon the defendant, Mary M. Davis, failed to do anything toward having the corporation wound up as provided by section 2995, Revised Statutes 1909, but proceeded to form a new corporation without notifying any of the parties interested of any of the facts. The new company was organized under the name of the "John Sterling Royal Remedy Company" with a capital stock of five thousand (\$5000) dollars divided into fifty shares; forty-eight (48) shares were issued to Mary M. Davis and one (1) share each to defendants, Irby W. Davis and Mary Marsh.

The property of the old company consisted of furniture, mailing lists, formulas, trade-marks, patents and the trade-name. The formulas and the trade-name had been in use for over twenty-five years. Although Mary M. Davis at the trial claimed that nothing but the trade-name was used in the new corporation, the

evidence, we think, shows that all of the assets of the old company were turned over by her to, and used by, the new company. Mary M. Davis at the trial testified that, in addition, real estate of the value of three thousand (\$3000) dollars was also a part of the assets upon which the new company was incorporated. We think a fair consideration of the evidence shows that this real estate was not in good faith made a part of the assets of the new company, the property was re-conveyed out of the company only a few days after the incorporation. After the formation of this new company, Mary M. Davis refused to make any further payments on the Oldham contract and on October 17, 1914, plaintiff, who was then the owner of said contract, served a written notice on her to the effect that the latter's rights in all of the shares in the old company, except eighty-four (84) shares, had terminated. But Mary M. Davis refused to turn over to plaintiff the company property. On October 23, 1914, plaintiff instituted this suit in equity, setting forth in her petition the facts of the transaction, claiming to be the absolute owner of four hundred and sixteen (416) shares of the stock of the old company; praying that the court award her forty-one and $\frac{6}{10}$ (41.6) shares of the stock of the new corporation (which was the proportion of the total number of shares in the new company that James W. Oldham's four hundred and sixteen shares bore to the entire number of shares of the old company); that a temporary injunction be granted enjoining the defendant, Mary M. Davis, from in any manner disposing of her stock in the new company, and that the new company be enjoined from transferring any shares of stock on its books until the further order of the court and until the temporary injunction might be heard.

Upon a trial of the case the court rendered judgment that defendant, Mary M. Davis, should within ten days from the date of said judgment pay to the plaintiff forty-seven hundred (\$4700) dollars, being the balance found to be due on the Oldham contract, or that she within said ten days, on behalf of herself and the John

Sterling Royal Remedy Company, transfer, by an instrument in writing, to plaintiff all of the rights and privileges "to use the trade-name, The John Sterling Royal Remedy Company, in the manufacture and sale of medicine under the copyright formula and trade-mark and trade-name, and the right to advertise and conduct business under such trade-name in the sale of such medicines and remedies," etc., "if such instrument be executed within said time then upon the execution thereof the said Mary M. Davis and John Sterling Royal Remedy Company, and the other defendants herein who hold under her, are hereby enjoined and prohibited from interfering thereafter with the full enjoyment of said rights and privileges, so granted to the said Lura O. Scott, and prohibited from causing John Sterling Royal Remedy Company interfering in any way therewith," etc. It was further provided in said decree that if the money should not be paid nor said instrument executed, that the defendants be prevented from in any way interfering with the plaintiff herein from setting up and establishing a business to continue the manufacture and sale of medicine under said copyright formula, etc., and that defendants be enjoined from using the corporate name, John Sterling Royal Remedy Company, in the sale of medicines or in its business. From this decree defendants have appealed.

It seems that at a prior term of court this cause was dismissed for want of prosecution without the knowledge of either party, but without knowing this fact both parties appeared at the trial and voluntarily submitted the pleadings, issues and evidence to the court and said judgment and decree was rendered thereon. While there can be but one final judgment in a cause and when the cause is dismissed at a previous term of court and no further order is made concerning the same at that term, after the adjournment of such term the court has lost jurisdiction of the cause and is powerless to reinstate it, nevertheless, the cause may be reinstated by the voluntary appearance and consent of the parties, although at a subsequent term. [Brew-

ing Co. v. Hogg, 141 Mo. App. 391.] As the parties in this case voluntarily appeared and submitted the cause to the court on the theory that no prior judgment had been rendered therein dismissing the case, we think that defendants are not now in a position to complain. As was said in Gate City National Bank v. Strother, 196 S. W. 447, "The appellants appeared thereafter, and without objection based on the point now urged, litigated their case and had all the opportunity for defense they chose to employ." Under the circumstances we believe defendants consented to the reinstatement and trial of this case.

Defendants contend that as the corporation expired in 1909 all acts of the corporation thereafter were absolutely void, and the title to the property was by statute (section 2995, Revised Statutes 1909) devolved upon trustees for the settlement of its affairs and the distribution of its assets. That the issuance of the new shares at the time of the execution of the Oldham contract was void. That the contract between Mary Weil and Mary M. Davis was likewise void, for the reason that when defendant, Mary M. Davis, purchased these shares from said Mary Weil it was the understanding of the parties that they were transferring valid shares in a live corporation and as it proved that such was not the case, that the contract was void and that the defendant, Mary M. Davis, was relieved from further payments thereunder, and that plaintiff, the assignee of Oldham, had no rights under such void contract, and that she now has none.

While it may be conceded that defendant, Mary M. Davis, upon a discovery that there was no valid corporation or shares of stock in existence, was relieved from further payments under the Oldham and the Weil-Davis contracts, nevertheless, this did not permit her to convert to her own use the assets of the company and form a new corporation with the same, and thereafter to refuse to continue her payments on the Oldham contract. The assets of the corporation belonged to the stockholders, it appearing that there were no cred-

itors, and when Mary M. Davis, who was in complete possession and control of the old company found out the true facts concerning its status as a corporation, it was her duty to call in all the interested parties and either adjust the various interests by re-incorporating the company and re-establishing the Oldham contract in reference to the new company, or adjust the situation in some other manner, or repudiate the Oldham contract altogether, demand the return of the money that would be due and turn the company and assets over to plaintiff to be by her disposed of as provided by section 2995, Revised Statutes 1909. But instead of doing any of these she wrongfully sought to deprive this plaintiff of her rights in the assets of the old company. As Mary M. Davis elected to retain the assets, in which she had no interest except that given her by the Oldham and the Weil-Davis contracts and the sale of the Marsh stock to her subject to those contracts, she must in equity and good conscience be deemed to have waived the lack of incorporation of the old company, and the rights of the parties now should be determined, as near as possible, under the terms of the Oldham contract. And in determining the rights of the parties the shares of stock held in pledge by Oldham and his assignee should be taken as representing the assets of the company, and while the shares themselves were void, as all powers of the corporation had terminated in 1909 (*Bradley v. Reppell*, 133 Mo. 545; *State ex rel. v. Hannibal, etc., Rd. Co.*, 138 Mo. 332; *State ex rel. v. Cape Girardeau, etc. Co.*, 207 Mo. 85), the pledging of the same to Oldham amounted to a pledge of the assets of the company itself (7 R. C. L., Sec. 145). Under these circumstances Oldham or the plaintiff, his assignee, had a right to pursue these assets to the new company as they constituted the only assets of such company, and the interests of no third party intervened. And when these assets were found to be in the new company plaintiff had a right to be restored in the new company to the rights she lost in the assets of the old company by Mary M. Davis' wrongful conduct.

Defendants attack the petition because they say that it counts upon an alleged cause of action wherein plaintiff asks that she be given the same rights in the new company as the shares of stock pledged to her gave her in the old; that in her petition she states that there has been in effect a foreclosure of the pledge, which has resulted in full ownership by plaintiff of four hundred and sixteen (416) shares of stock so pledged, without any right of redemption on the part of the defendants; that plaintiff has received seventeen hundred (\$1700) dollars or more money under the Oldham contract but does not offer to restore the money which has been actually paid upon said stock; that the petition fails to state a cause of action in equity by reason of the maxim "that he who seeks equity must do equity." It would seem that in equity cases no tender is necessary. [See *Whelan v. Reilly*, 61 Mo. 565.]

However, it will be noted that the court did not grant the relief requested by plaintiff but under plaintiff's prayer for general equitable relief granted other relief. If sufficient facts are stated in the petition to entitle her to relief, the particular relief asked may be disregarded and the court may grant any relief consistent with the case made by the petition and with the issues. [*Holland v. Anderson*, 38 Mo. 55; *Sharkey v. McDermott*, 91 Mo. 647.]

However, we do not believe that the court should have decreed that defendants be required, on condition, to turn over all the assets of the company to plaintiff. While the Oldham contract provided that in case the payments were not made all the assets should be turned over to Oldham (or plaintiff, his assignee) free from the interference of Mary M. Davis, nevertheless, that contract did not contemplate that Mary M. Davis have no further interest in the company, as it was provided that she should still have eighty-four (84) shares out of the total of five hundred (500) shares of the old company. We think, then, that the decree should be modified so as to provide in effect that Mary M. Davis reinstate the Oldham contract in reference to the shares

of stock in the new company and that she be required to execute a new contract in writing, and in form to be approved by the court, pledging all of the stock in the new company to plaintiff for the unpaid balance due on the Oldham contract (after paying in cash all payments in arrears); Mary M. Davis to have back eight and 4/10 (8.4) shares in case she make default in such new contract. The new contract to be in terms the same as the Oldham contract so far as the changed conditions will permit. If Mary M. Davis refuses to do as indicated then she shall be ordered to pay to plaintiff the unpaid balance on the Oldham contract, to be arrived at by the court; and should she refuse to make such payment then a receiver shall be appointed to take charge of all the assets, tangible and intangible, of John Sterling Royal Remedy Company, who shall sell them under order of the court, and of the proceeds 416/500 shall be paid to plaintiff and 84/500 paid to Mary M. Davis, and that, thereafter, defendants be enjoined from using the name, John Sterling Royal Remedy Company, or a name substantially the same, in the manufacture or sale of medicines or in their business. All costs of this case shall be paid by defendant, Mary M. Davis.

The judgment is reversed and the cause remanded with directions to the lower court to proceed as directed. All concur.

THE CUDAHY PACKING COMPANY, a Corporation,
Respondent, v. THE ATCHISON, TOPEKA &
SANTA FE RAILWAY COMPANY, a Corpora-
tion, Appellant.

Kansas City Court of Appeals, February 18, 1918.

1. **COMMON CARRIERS: Damages to Meats: Insurers.** A packing company delivered to a railroad company for shipment fresh meats packed in shippers' refrigerator cars with directions to the

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carrier for icing in transit. The meat was spoiled when it reached destination. The action was based on the common-law liability of the carrier as an insurer. It was held that the verdict of the jury, as to the first count would not be disturbed, but because the bill of lading covering the car involved in the third count contained a provision requiring notice in writing within four months of a claim for damages, which was not given, the verdict on the third count was reversed.

2. ———: **Bills of Lading: Notice of Claim.** The purpose of the provision in a bill of lading requiring notice of a claim for damages is to allow the carrier an opportunity to investigate and either settle the claim or prepare for a contest, and while substantial compliance with such a provision is sufficient, the notice must be one of a *claim* and not merely of a damaged shipment.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner*, Judge.

AFFIRMED IN PART. REVERSED IN PART.

Thomas R. Morrow, Geo. J. Mersereau, John H. Lathrop, Sloane Turgeon and J. D. Hamilton for appellant.

New, Miller, Camack & Winger, P. E. Reeder and John Taylor for respondent.

BLAND, J.—This suit was brought in three counts. The second count was dismissed. The first count is for damages to a car of fresh meat shipped by plaintiff from Wichita, Kansas, to New York City; the third count is for damages to a car of fresh meat shipped from Wichita, Kansas, to Passaic, N. J. Plaintiff having recovered on both counts, defendant has appealed.

Defendant urges that there was no evidence that the meat was in good condition at the time it was delivered to the defendant at the point of origin, as alleged in the petition. Plaintiff's evidence on this point shows that the meat was branded and packed in the usual way at its packing plant located at Wichita, Kansas; that all meat was inspected by government inspectors immediately before and after it was butchered and when loaded

was again inspected, and this latter inspection included an examination of the interior of the car to see that it was sanitary, properly cleaned, that the doors were closed properly and that the roof was tight; that the government would not allow meat that was not properly inspected and branded to go into the cars; that the manner of preparing a shipment of meat was that cattle, veal and sheep were retained, after being killed, in its packing plant from one to six days before being shipped, so that it would be entirely free from animal heat; that it was then in proper condition for shipment; that pork was shipped two or three days after killed; that under proper refrigeration all meats so shipped would keep for thirty days.

The evidence, although general as to the condition of the meat, shows that it was packed under the general and invariable practice as already detailed, and under the circumstances this evidence was sufficient to show that the meat was properly packed and that it was in good condition at the time it was delivered to the defendant. [Equitable Elevator Co. v. U. P. Ry. Co., 191 S. W. 1067.]

Defendant complains of the refusal by the court to give its instruction No. 15, which sought to tell the jury that if the damage to the meat was caused by the insufficiency of the cars to properly refrigerate or cool the meat, even though defendant followed the icing instructions given by plaintiff in its bill of lading, that is to say, that the cars were not proper refrigeration plants, their verdict should be for the defendant.

These shipments of meat were in sealed cars of plaintiff's own make and choosing, and defendant had nothing to do with the inside thereof except to follow the icing instructions. Defendant introduced evidence tending to show that it followed the icing instructions and that the cars were moved forward without delay. Under these circumstances defendant says that there was evidence that tended to eliminate every possible cause but that the meat spoiled by reason of it not being properly packed.

[Citing Cudahy Packing Co. v. A. T. & S. F. Ry. Co., 193 Mo. App. 572.]

Without passing upon the sufficiency of this evidence, we find that this defense was not pleaded and for that reason the instruction should not have been given. [McCarthy & Baldwin v. Louisville and Nashville R. R. Co., 102 Ala., 1. c. 202-203; 10 Corpus Juris., pp. 110 and 373.] However, defendant urges that it pleaded this defense, in that it set up in its answer that the damage to the meat was "due to the condition of the meat or its natural propensity and tendency to decay and spoil," and not due to any act of the defendant or the failure of the defendant to in any way perform its duty as a carrier. We do not think that this allegation includes an allegation that the meat spoiled as a result of an act or fault of the shipper in failing to furnish proper refrigerating cars. If defendant desired to rely on a claim that the meat spoiled on account of such a fault of the shipper, it should have set up this defense in its answer. A defense that the meat spoiled by reason of its inherent qualities does not necessarily include a defense that it spoiled as the result of a fault of the shipper in failing to furnish proper refrigerating cars. Cases can be imagined where the shipper would not be at fault in packing goods and still they would be damaged by reason of defects inherent in them. There is nothing in the case of Cudahy Packing Co. v. A. T. & S. F. Ry. Co., supra, to the effect that a pleading that meat spoiled from its inherent tendency to decay includes an allegation that it decayed because not in proper refrigerating cars. The court in that case was not discussing the question of pleading but the question as to whether the defendant introduced evidence of a circumstantial nature tending to prove that the meat spoiled because not properly packed. The sole question considered in that case was a question of evidence, that is, whether the lower court erred in giving a peremptory instruction in favor of plaintiff when it was claimed that the evidence was conflicting. In the case at bar the court gave an instruction for defendant telling the jury that if the

meat spoiled on account of any natural infirmity of the meat, they should find for defendant.

Nor do we think that a defense that the meat spoil because of being packed in defective refrigerating cars was covered by the general denial. The petition did not allege that the refrigerating cars were proper ones but pleaded that the meat was accepted by defendant in the cars in which it was packed. If defendant chose to accept the cars regardless of whether they were good refrigerating cars, it was privileged to do so, and yet it would be liable. The general denial raised no issue as to the sufficiency of the cars. As defendant did not set it up, that question was not in the pleadings.

Defendant's third point assumes that defendant's liability is based upon negligence. This is an erroneous assumption. Defendant was sued on its common law liability, as an insurer. Its liability as a carrier is not based on any theory of negligence but upon the fact that it is an insurer. [Collins v. Denver & Rio Grande Ry. Co., 181 Mo. App. 213; Cudahy Packing Co. v. A. T. & S. F. Ry. Co., supra, l. c. 577-578.]

However, plaintiff is not entitled to recover for damages to the car mentioned in the third count. The bill of lading covering that car contained a provision as follows:

"Claims for loss, damage or delay, must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carriers shall not be liable."

There was no compliance with this provision of notice. The evidence shows that the meat was delivered by plaintiff to the defendant but that the terminal carrier was the Erie Railroad. When the car arrived at Passiac, N. J., it was inspected by plaintiff's branch manager and the meat contained therein was found to have been spoiled, and the manager immediately called by telephone the local freight agent of the terminal

carrier and notified him of the damaged condition of the meat. Plaintiff's manager and the freight agent together inspected the meat and they both found it damaged and the latter notified in writing this defendant of the damage. So far as the evidence shows nothing was said as to any intention on the part of plaintiff to make any claim for the damage. Plaintiff's manager returned to his office and sent the freight agent the following letter: "This is to confirm our verbal notice of the poor condition of C. R. L. car 3725." There is nothing in this letter mentioning any claim or intended claim of damages. The bill of lading expressly provides that claims for loss or damage must be made in writing and unless such claims are made the carrier shall not be liable. It is well settled that provisions of this nature are binding upon the shipper. [Georgia, Fla. & Ala. Rd. Co. v. Blish Milling Co., 241 U. S. 190; Banaka v. Mo. Pac. Ry. Co., 193 Mo. App. 345; Kemper Milling Co. v. Mo. Pac. Ry. Co., 193 Mo. App. 466; Johnson v. Mo. Pac. Ry. Co., 187 S. W. 282.]

But plaintiff urges that the letter written by its branch manager, taken with all the facts concerning the inspection of the meat by its manager and the local freight agent of the Erie Railroad, shows that it was intended and was understood by the parties that this letter was a notice of claim. As far as the evidence is concerned, there was no mention of any claim, either oral or in writing. If we are permitted to go into the matter of intention, we cannot say that any such intention was indisputably shown. The fact that plaintiff was investigating the cause of the loss does not necessarily mean that it had made up its mind that either of the carriers was at fault. It may have found after a thorough investigation that the carriers were not at fault but that the loss occurred by reason of some fault of plaintiff. The letter may have been written to supply evidence that the meat was in poor condition in case claim was afterwards made.

There is nothing in the evidence of any nature to show whether at the time plaintiff's branch manager

wrote the letter mentioned, plaintiff had determined that the railroad company was at fault. In addition to this, there is nothing to show that the railroad company knew that plaintiff was making a claim for damages when its branch manager wrote the letter mentioned to this defendant. The fact that the freight claim agent wrote this letter to defendant notifying it of the damaged condition of the meat does not show beyond dispute that the freight claim agent took it that plaintiff was making a claim for damages. The evidence does not show that there was anything in the letter mentioning that a claim was contemplated. It might have been that the carriers had a policy of making a partial investigation of a damaged shipment, whether a claim had been made or not, which would not be as thorough or made for the purpose of contesting or settling a claim as if notice, which it had a right to receive under the terms of the bill of lading, were given.

The fact that the freight claim agent knew of the damaged condition of the goods did not dispense with a notice in writing by plaintiff of a claim for damages. The fact that this agent knew these things does not show, as we have already stated, that he knew that a claim would be filed. The purpose of the bill of lading in requiring the filing of notice of a claim is to allow the carrier an opportunity to investigate and either settle the claim or to prepare for its contest. While substantial compliance with the provision for notice of claim for loss is all that is necessary, the notice must be one of a *claim* or *intended claim* and not merely that the shipment was damaged. It is held in *Gees Comm. Co. v. Ill. Cent. R. R. Co.*, 193 Mo. App. 1. c. 683, that the provision for notice calls for a notice that a *claim* will be made for the *loss*. The Supreme Court of the United States in *St. L., I. M. & S. R. R. Co. v. Starbird*, 37 Supreme Ct. Rep. 1. c. 468, said:

"It is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such

notice puts in permanent form the evidence of an intention to *claim damages*, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the require while there is opportunity so to do." (Italics ours).

It is quite plain that the carrier is not protected unless it knows that a *claim* will be filed in addition to knowing that the shipment has been damaged. Unless the carrier knows that a claim will be filed, there would be no occasion for it to prepare to contest or settle it. It was in *Johnson v. Mo. Pac. Ry. Co.*, supra, l. c. 283, that a talk had between the consignee and the station agent in reference to the damage did not constitute even oral notice that a claim would be presented, although if the consignee had informed the station agent orally that a claim would be presented it would not have been a compliance with the terms of the bill of lading.

For these reasons the judgment in favor of plaintiff on the third count of its petition is reversed, but is affirmed as to the first count of its petition. All concur.

COUNTY OF JACKSON ex rel. ORBIE BRYSON,
Respondent, v. M. M. ENRIGHT, WALTER
GRAY and EMMA N. HEINS, Administratrix of
the Estate of H. J. HEINS, Deceased, Appellants.

Kansas City Court of Appeals, February 18, 1918.

1. **DRAMSHOPS: Damages: Pleading: Sales of Liquor to Husband after Notice not to Do so by Wife.** In an action against a dramshop keeper and his bondsmen for damages for selling liquor to plaintiff's husband after she had notified the dramshop not to do so, where the petition alleges that the saloonkeeper had executed according to law the dramshop license bond and described a valid instrument and the defendants had failed to deny its execution under oath, the license bond stands confessed as described.

2. ———: **Pleading: Separate Sales of Liquor in One Count.** Where a petition alleges ten separate sales of liquor to plaintiff's husband, an habitual drunkard, in one count and a general recovery was had on four of such sales, the court having given the jury a form of verdict which permitted the jury to return a general verdict on the four sales, the defendants, having failed to attack the defect in the petition by motion or other pleading, are not in a position to raise such question after verdict.
3. **BONDS: Statutory: Construction.** In construing statutory bonds the general language of the bond must be interpreted in the light of the statute pertaining to the subject-matter of the bond, such statute being read into the bond and sureties are held to have contracted with a view to such statute.

Appeal from Jackson Circuit Court.—*Hon. Kimbrough Stone, Judge.*

AFFIRMED.

Sparrow & Page and *James Pickett* for appellants.

E. H. Hamilton and *A. R. McClanahan* for respondents.

BLAND, C.—Relator, Orbie Bryson, as the wife of George W. Bryson, deceased, brought this action against defendant Enright as principal and defendants Heins and Gray as sureties on a statutory dramshop bond, alleging that on ten different occasions defendant Enright, the keeper of the saloon, sold intoxicating liquor to her said husband, George W. Bryson, an habitual drunkard, after she had notified him not to do so, and further alleging that finally in a fit of intoxication her husband committed suicide by taking poison. Plaintiff recovered a judgment in the sum of two thousand (\$2,000) dollars, the same being the maximum penalty for four sales of intoxicating liquor made to deceased by defendant Enright, and defendants have appealed.

Defendants urge that the bond was given in the name of the State of Missouri and not in the name of the county as required by section 7196, Revised Statutes 1909, and that their demurrer to the evidence should

have been sustained. The petition alleges that defendants executed according to law the dramshop license bond sued upon, and having described a valid instrument and defendants having failed to deny its execution under oath, its execution, as described, stands confessed. [Johnson v. Woodmen of the World, 119 Mo. App. 1. c. 102; Love v. Central Life Ins. Co., 92 Mo. App. 192.] The execution of the bond having been admitted by the defendants, plaintiff introduced evidence and rested her case without introducing the bond in evidence.

During the cross-examination by plaintiff of the defendant Enright, while the defendants were putting in their case, Enright refused to say that he had executed the bond, and for the purpose of showing his signature thereto and the execution thereof by Enright plaintiff introduced the bond in evidence, apparently overlooking the fact that the pleadings settled all of these matters in favor of plaintiff. The bond thus introduced in evidence was made in favor of the State of Missouri. The bond was not introduced by plaintiff in support of her case. Defendant Enright objected to the introduction in evidence of the bond and at no time did defendants themselves introduce the bond in evidence. A defense that the bond was not properly executed was not made at the trial. The burden of the defense was that plaintiff never warned the saloon keeper or any of his agents not to sell liquor to deceased; that plaintiff's character was bad and that she was not worthy of belief. The case was not tried on the theory that the bond was not executed in the name of the county. Defendants, having admitted the execution of the bond, the same not being introduced by plaintiff in making her case (but only during the defense for impeachment, purposes) and defendants having failed to use the bond as a matter of defense, but tried the case on other theories, we fail to see how any question affecting the validity of the bond can now be raised.

It is stated in Johnson v. Woodmen of the World, *supra*:

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“By failing to deny the execution of the instrument under oath, the defendant admitted or confessed its execution. [See 746, R. S. 1899.] The execution of what instrument was confessed? Manifestly the instrument alleged or described in the petition. As said in *Hart v. Harrison*, 91 Mo. 414, 422, the instrument ‘described in the petition,’ is confessed. There is therefore no necessity for introducing it in evidence, since its existence, as set forth, being admitted, no issue is made upon which evidence can apply. [State to use *v. Chamberlain*, 54 Mo. 338; *Thomas v. Life Ass’n*, 73 Mo. App. 371; *Love v. Ins. Co.*, 92 Mo. App. 192.] When it is said in the cases cited that the execution of such an instrument stood confessed as a valid contract, it was meant, of course, that it was a valid contract, so far as its execution was concerned. For, there might be cases where the allegations setting forth or describing such instrument would show, that though executed, it was not, legally, a binding obligation. That, however, is not the case here. The petition described a valid instrument and its execution, as described, stands confessed.

“But though the execution of an instrument of writing, as set forth by a plaintiff, is confessed, it does not follow that the defendant should not be allowed to show, under a proper answer, that no consideration for the instrument had been rendered. [21 Mo. App. 390.] We therefore can see no reason why, in this case, the defendant would not have been able to show, under a proper answer, that deceased Johnson failed to pay his assessments and dues and thereby failed to render the consideration necessary to continue the certificate as a binding contract after its execution. By the terms of the statute, the certificate, as we have said, imports a consideration. But that, of course, does not prevent an affirmation showing that, in point of fact, there was no consideration, or that it failed.”

Of course, as we have already said, defendants made no effort to show, nor did they claim, that the bond was not a valid one, therefore, the introduction of the bond

in evidence by plaintiff could not have changed the situation under the circumstances.

The conditions of said bond were as follows:

"Now if the said party, as principal, shall keep at all times an orderly house, and shall not sell, give away or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquor, in any quantity, to any minor, and if he shall not violate any of the provisions of the laws of the State of Missouri and Amendments thereto, relative to Dramshops; and if he shall pay all fines, penalties and forfeitures that may be adjudged against him under the provisions of said laws and amendments thereto, and if he shall pay all taxes on statements accompanying application, then this obligation shall be void; otherwise to be and remain in full force."

Defendants urge under the doctrine of *strictissimi juris* as applied to sureties upon bonds of this kind that the defendants, Heins and Gray, the sureties on the bond, should not be held liable under its terms to a wife for the selling of liquor to her husband, an habitual drunkard, as the bond by its express terms does not include such a liability. It is now well settled in this State that in construing statutory bonds the general language of the bond must be interpreted in the light of the statute pertaining to the subject-matter of the bond, that such a statute is to be read into the bond, and that the sureties are held to have contracted with a view to such statute. [Henry County v. Salmon, 201 Mo. 136; State ex rel. v. Rubber Mfg. Co., 149 Mo. 1. c. 212.]

In view of this it is necessary to examine sections of the statute covering the matters in connection with section 7196, Revised Statutes 1909, *supra*, which provides for the giving of dramshop keeper's bonds. And in this connection we find section 8223, Revised Statutes 1909, covering the selling of intoxicating liquors to habitual drunkards. In this latter section we find that it is provided that dramshop keepers cannot sell intoxicating liquor to an habitual drunkard after the former has been notified by the wife of the latter not to so sell;

and providing further that if such dramshop keeper does so sell intoxicating liquor, the wife may sue on such bond. Section 7223 must be read into the bond given by defendants in this case, and after this is done it is apparent that the bond not only covers the selling of intoxicating liquors by dramshop keepers to an habitual drunkard under the circumstances prohibited under such section, but also provides that the wife of such habitual drunkard may bring suit upon such bond.

This suit was brought on a petition alleging ten separate sales of intoxicating liquor in one count, and a general recovery was had on four of such sales. The court gave to the jury a form of verdict which permitted them to render a general verdict on the four sales. The jury thereafter rendered a general verdict in the sum of two thousand (\$2000) dollars, being the maximum penalty for the four sales. On this defendants base an assignment of error. Defendants did not attempt to reach this defect in the petition by a motion or other pleading but filed their separate general denials or answers. Having taken this course defendants are not now in a position to urge this point as all the pleaded causes submitted to the jury were good and there was evidence to support all of the sales submitted to the jury. [Finnell v. Street Ry. Co., 159 Mo. App. 522.]

Defendants complain of various remarks by plaintiff's counsel to the jury. Defendants objected to these remarks and the court sustained the objections. Defendants now urge that the court should have rebuked plaintiff's counsel for the remarks. Defendants' counsel did not ask that plaintiff's counsel be rebuked and defendants saved no exceptions of any kind to the rulings of the court made in reference to these objections. Under the circumstances defendants are in no position to make this point in this court.

The judgment is affirmed. All concur.

GENE THOMAS, Defendant in Error, v. EQUITABLE
LIFE ASSURANCE SOCIETY, Plaintiff in
Error.

Kansas City Court of Appeals, February 18, 1918.

1. **LIFE INSURANCE POLICY: Green Slip Attached: General Agent: Illustration.** A general agent of a life insurance company represented to one whom he was soliciting to take out a life policy for \$1000 paid up in twenty years that at the end of that period he had certain privileges in cash, or he could choose a paid-up policy for \$1830 and that a paper to that effect, known as a "green slip" would be attached to the policy. The assured was thereby induced to apply for a policy, and when such policy was delivered to him it had the "green slip" attached whereby it was stated that the assured had the privileges the agent had represented; the slip was held to be a part of the policy, notwithstanding the statement therein that it was merely an illustration of what the assured privilege might be.
2. **———: Surplus: Trust Fund: Account.** The surplus accruing under a life insurance policy paid-up in a given number of years, is a trust fund accruing and growing in the hands of the company for the benefit of the assured, and the company must account for it as trustee, and it cannot, arbitrarily, fix upon a certain sum as the amount due the assured.
3. **GREEN SLIP: Attached to Policy: Illustration: Prima-Facie Case.** Where a life insurance company attached a green slip of paper to a policy wherein it stated, by way of illustration of what the policy would earn as surplus in a twenty-year period, what similar policies had earned in other similar periods, such paper made a prima-facie case for the assured that his policy would earn a like amount in the absence of the company showing the actual fact which was within its knowledge and unknown to the assured.

Appeal from Adair Circuit Court.—*Hon. C. D. Stewart,*
Judge.

AFFIRMED.

Campbell & Ellison for defendant in error.

Higbee & Mills and *New, Miller, Camack & Winger*
for plaintiff in error.

ELLISON, P. J.—Plaintiff's action is to require defendant to specifically perform its contract of life insurance by issuing to him a paid-up policy for \$1830. It is based on a twenty payment tontine policy of life insurance issued by defendant dated the 15th of December, 1893. The judgment in the trial court was for the plaintiff.

The face of the policy proper is a simple promise to pay \$1000 in consideration of the application and twenty annual payments of premiums of \$27.60 each. Under the signatures to the policy is the following:

“Notice—This policy and the application taken therefor taken together constitute the entire contract which cannot be varied except in writing by one of the Executive Officers printed above.”

On the back of the policy is the following:

“LIST OF PRIVILEGES.”

“It gives to Gene D. Thomas a choice of six methods of settlement upon the completion of the Tontine Period, on the 11th Dec., 1913; First: The continuance of the policy, and the withdrawal of the accumulated surplus, Either in (1) Cash: (2) Paid up Assurance: (3) An Annuity. Or Second: The surrender of the policy for its full value consisting of the entire reserve amounting to \$404. Four hundred and four dollars together with the surplus then apportioned by the Society, Either in Cash, or

Paid-Up Assurance, or

A Life Annuity.”

(Signed)

H. B. HYDE, Pres.,

W. ALEXANDER, Secy,

GEO E. JOHNSON, Gen'l Agent.”

Then the following:

“The Tontine Period ends December, 11, 1913. This policy if then in force may either be continued (after which dividends will be apportioned annually from surplus earned) or surrendered. See List of Privileges. No dividend will be declared on this policy

until the 11th day of Dec., 1913. Amount, \$1000 Term Life 20 A. P. First Payment, \$27.60 A premium due 11th Dec., \$27.60. At the end of twenty years, if this policy is then in force, premiums cease, and the policy becomes a fully paid-up life policy."

Pasted on and attached to the policy was the following paper, known as the "Green Slip:"

"Free to _____ Illustration Blank. For a — 2 — Payment Life policy, with _____ pending Tontine period. N. B. This blank must be filled up from the Book of tables issued during the current years by the Equitable Life Assurance Society of the United States, and based on the Society's experience on different form of Tontine assurance, up to 1893. It is impossible to predict the results of the future, but from the tables referred to above it is easy to show approximately the amount of surplus profits which would now be payable on a Tontine Policy of the Equitable Life Assurance Society of the United States if it had been issued in the past and ended its Tontine period at the present time. While the results of the future must necessarily depend on the experience of the future (and although some variation must be expected in view of a lower rate of interest and of other modified conditions which affect all life companies and, in a measure, all branches of financial business), figures based on past experience furnish the best attainable data upon which to judge the society and the value of its Tontine Policies. The following figures given on this basis, are therefore deserving of careful examination:

"ILLUSTRATION."

Amt. of policy, \$1000. Tontine period, 20 yrs.
Kind, 20 A. P. Age, 24. Annual Premiums, \$27.60.
Total premiums paid in 20 years \$552.00.

OPTIONS AT END OF TONTINE PERIOD.

1. Cash value consisting of reserve
\$404.00 and surplus \$334.00,\$738.00
or, 2. Paid up value, \$1830.00
or, 3. Cash surplus, \$334.00

(Or Life Annuity for amount surplus will purchase. Original policy now being fully paid up).

GEO. E. JOHNSON, Agent, Gen'l Agent.

Dated at Kirksville, Mo., 11-12-1893."

Plaintiff completed his twenty annual premium payments.

It will be noticed from the foregoing that plaintiff had several privileges or options in the method of settlement of the contract. He elected to take paid-up insurance for \$1830. But defendant has insisted from the first that the method claimed by plaintiff of taking a paid-up policy for \$1830 is not one of his privileges. Defendant says that the privilege of settlement at the end of the twenty years given to plaintiff was that he could hold his present policy of \$1000 as fully paid-up; and in addition thereto to convert the surplus accumulated on the policy "*as then determined by the defendant*" into additional nonparticipating insurance. And defendant further says it declared the amount of surplus, thus accumulated on plaintiff's policy during the twenty years it had run, to be one hundred and sixty-five dollars and six cents which would purchase him three hundred and seventy dollars additional insurance, making in all, thirteen hundred and seventy dollars. Defendant set up in its answer that plaintiff selected that form of settlement, and it tendered him a certificate for the additional insurance, which he refused to accept; whereupon defendant tendered it into court.

It is thus seen that plaintiff's claim is for paid-up insurance for \$1830 and defendant's is that he should only have \$1370. Plaintiff's claim is based on the above-mentioned "green slip" being a part of the contract. Defendant accounts for the "green slip" as being merely a suggestion based on past experience of the company with a like policy and not intended as an obligation on its part.

It will be noted that the face of the policy proper is nothing but a simple agreement to pay \$1000 in consideration of the application and twenty annual payments of \$27.60 each. Then what is denominated "priv-

ileges" extended to plaintiff, are found on the back of the policy. These privileges, so far as concerns this controversy, are that at the end of the twenty-year period plaintiff could keep the policy and take the surplus which had accumulated during these years, and with it purchase additional paid-up insurance.

It is at this point that the "green slip" attached to the policy as above set out, begins to affect the case. On that paper there is a heading in bold type composed of the word "Illustration," under which is the amount of the policy, premium, age, etc., which is followed by the words, in bold type, "Options At End of Tontine Period," followed by this: Either, 1st, Cash value consisting of reserve \$404 and surplus \$334, total \$738; or, paid-up value of \$1830; or, surplus payable in cash \$334. As has been said plaintiff exercised the option to keep the policy and take the accumulated surplus in paid-up insurance, together amounting, as he claims, to \$1830.

Plaintiff arrives at his amount from the statement of that amount in the green slip. Defendant arrives at the lesser amount in this way: The provision as to privileges set out on the back of the policy for paid-up insurance in addition to the original policy, is that plaintiff could withdraw the "accumulated surplus" by investing in it "paid-up insurance;" and it claims the right under the contract to itself "apportion," by naming the amount of this surplus, and insists that it did name the amount as \$165.06, which, at plaintiff's age, would purchase the said sum of \$370.

It is true that under subdivision VI of the application entitled "Tontine Profits," it is stated that at the end of the tontine period the policy shall participate in the surplus "as may then be apportioned by the Society." We do not interpret that as meaning that the insurance company may arbitrarily fix upon a sum of money though it may be far less than the real sum and say it apportions such wrong amount as the surplus. That would be to say that the company could defraud the insured by turning over a part of what his

policy has earned and what belongs to him and convert the balance to its own use. The surplus is a trust fund in the company's hands and upon adjustment, it all must be accounted for. The words, "as may then be," in the expression, "as may then be apportioned by the Society," means, "to be." The expression is not permissive, but mandatory. "The company cannot satisfy its contract by saying that it apportioned to the policy all that was due under it. It must show what was due under it—how ascertained, and from what sources—else it becomes the judge as well as contracting party." [Equitable Life Assurance Society v. Winn, 137 Ky. 641, 646.]

We have not overlooked that it is a part of defendant's insistence that by use of the word "then" in the expression, it was meant that the apportionment was not to be made until the end of the tontine period, and therefore it could not have been intended to make a guaranty of a definite sum at the beginning of that period. The suggestion, we think, does not answer the position that to induce plaintiff to take the policy, defendant did agree that the sum to be apportioned at the end would be \$1830.

So we deny that defendant has a right to fix the surplus contrary to what it is in point of fact in the instance of the plaintiff exercising his privilege of retaining the original policy and using the surplus to purchase other additional insurance; and we therefore come to a consideration whether the green slip is to be taken as a guaranty, or contract, that the paid-up insurance, including the original policy, shall be \$1830 as found by the trial court.

From the argument it would seem that defendant looks upon the slip as the individual matter of a local soliciting agent not binding on it; and that it is apparently at a loss to know how the slip became attached to the policy. In the first place the agent who solicited and obtained the policy for plaintiff and delivered it to him, was a general agent (he so testified in answer to a question by defendant), and the slip

attached to the policy when it was delivered, was signed "Gid E. Johnson Agent, Gen'l. Agent." It is not denied that it was gotten out in blank form by the defendant company, of course to be used by agents; and it contains printed direction that the blanks therein are to be filled up from defendant's "Book of Tables" issued by it during the current years, to be based on defendant's experience up to 1893, the date of this policy. We think there can be no doubt but that it should be taken and considered as though the defendant itself had filled in the blanks and attached the slip to the policy and then delivered to the plaintiff. This, however, still leaves the effect of the slip to be considered, but it gets out of the way much of the discussion in the case.

Plaintiff testified that the agent had represented when he was seeking to get him to insure that the paid-up policy would amount to \$1830 and that it was this which formed an inducement to him to enter into the contract and that when the policy was delivered he saw that the agent's representation had been embodied in the slip and he accepted it. We cannot distinguish the case from that of *Forman v. Mutual Life Ins. Co.*, 173 Ky. 547, where the entire question is discussed at length. The statement of the facts in that case, the conduct of the parties, the influence that attaching the slip had in that case are practically the same as in this. It is true the slip in that case was signed by the "Assistant Secretary" of the company, while in this it is by a "General Agent," but we are satisfied it was the company's act in each instance and we are only left to interpret the meaning of the representation, or illustration, whichever it may be called. The court in that case said at page 563 of the report that, "No person of ordinary intelligence, receiving a policy under the circumstances Mr. Forman accepted this one, would have any reasonable doubt that the 'illustration' was intended to be and was a part of the contract. Nor can there be any reasonable doubt that the company intended he should so believe."

In this case, as in that, aside from the amount stated in the green slip, there is no sum named as the surplus, neither in the policy itself, in the printed matter on the back of it, or in the application. So that we have to depend on the slip alone for anything in this respect of definite character. We therefore are confronted with the question exactly as the Court was in the Forman case, that is, whether the slip though a part of the contract, binds the company to issue the additional insurance in a certain sum (in that case to pay a certain surplus), or was it intended as a mere promise to issue an additional policy in whatever sum defendant might arbitrarily apportion as the surplus? We think it bound to the former. The Court in that case said (p. 563): "that neither in the application nor in the policy is there any statement as to the amount of surplus that would be apportioned to the policy. The matter of distribution and apportionment was left by the terms of these papers to the good faith and honesty of the company. But when we turn to the 'illustration' we find, in option 'D', under the head of 'options at the end of twenty years,' that he should have the right 'to draw accumulated surplus in cash, . . . \$998.08 cash surplus.' It is very true that this 'illustration' also recites that: 'What this surplus will be in future settlements will necessarily depend upon subsequent experience,' and further states that: 'The accompanying figures are correct as an illustration based upon the experience of the company.' But if the company did not intend to practice a fraud on Forman or to deceive him—and it is urgently insisted that the company did not intend to do either—what was the purpose in making a part of the contract this 'illustration' and specifying in it that he should have the option at the end of 20 years "to draw accumulated surplus in cash, . . . \$996.08?"

But there is another phase of the case which determines it against the defendant. Leaving the "green slip" and going to the policy itself, we find on the back thereof as we have already set out that at the end of the tontine period, plaintiff could elect to continue the

original policy as paid-up and "withdraw the accumulated surplus" with which he could purchase additional "paid-up assurance." By this he was entitled to an amount of accumulated surplus to be invested in paid-up insurance; and that amount is unnamed. How is he to ascertain what it is—how is he to learn what it has grown to be in the twenty years it has been accumulating in defendant's hands? At the trial the green slip made out by defendant was introduced in evidence. It showed according to defendant's own theory what surplus similar policies had earned in the same period just preceding this one, viz., \$334, which would purchase for plaintiff \$830 additional insurance, being the amount he claims should be added to the original policy.

Now that showing was of some probative force. The true amount was wholly unknown to plaintiff, but was fully known to defendant. It had data at hand from which it could, at any moment, furnish complete information. In these circumstances was not the *onus* thrown on defendant to show the true amount if it meant to dispute the "green slip Illustration?"

There is a rule of evidence which has been formulated upon the most reasonable ground and which has the effect to prevent a failure of justice. It is that where knowledge of a material fact lies with one party he must prove it (*Clifford v. Donovan*, 195 Mo. 266, 285; *Frame v. Sovereign Camp*, 67 Mo. App. 127, 135); the other party being unable to produce evidence of it, it will be presumed to be that which would be most advantageous to the party who cannot produce it as against him who can. 1 *Wigmore on Evidence*, Sec. 285, pages 368, 369, and notes of decisions, among others the case of *Armory v. Delamirie*, 1 *Strange* 505, where the jeweler kept a jewel which the boy who found it gave him to look at. In an action of trover by the boy who claimed it was of finest quality, the jeweler refusing to produce it, the boy was allowed its value on his estimate of its quality. For closely related rule see *Fifth-Third Nat'l. Bank v. McCrory*, 191 Mo. App. 295, 297, 298; *Cudahy v. Railroad*, 196 S. W. 406.

The surplus arising on a policy like this is, as we have said, a trust fund in the hands of the insurance company. It is the duty of such companies to keep a record of it, and it is common knowledge that they have a system, evidenced by their books, whereby they keep trace of its growth as well as its decline, so that they may at the proper time for accounting to the policyholder render to him, or produce to the court, a statement showing the fact. [Equitable Life Assurance Society v. Winn, 137 Ky. 641, 648.] It would be as unjust as it is absurd to say that an insurance company may apportion an arbitrary amount as the surplus and when its correctness is questioned, to allow it to hide the fact by refusing to produce the evidence showing such fact.

Defendant makes technical complaint of the form of the judgment. The order contained in the judgment is that defendant execute an instrument of writing by the terms of which it will obligate itself to pay \$1830 on the death of plaintiff; and that defendant may make such obligation by endorsement upon the policy, or by attaching thereto an instrument of writing executed by it; or by the execution of an entirely new obligation, etc. We do not see wherein this choice of mode of arriving at the result ordered can in any way harm defendant. It would appear that, if anything, it would probably be a beneficial convenience to it.

We have not discovered any ground for disturbing the judgment and it is accordingly affirmed. *Timble, J.*, concurs. *Bland, J.*, dissents.

BLAND, J. (dissenting).—I am unable to agree to the majority opinion in this case and will state as briefly as possible the reasons for my dissent.

On the 15th day of December, 1893, the defendant issued to the plaintiff a policy of life insurance in the sum of one thousand (\$1,000) dollars; this policy was designated as a "Free Tontine Limited Payment Life Policy." The policy provided that should the plaintiff pay the annual premium of twenty-seven and 60/100 (\$27.60) dollars, provided therein, yearly for twenty

(20) years, that on the 11th day of December, 1913, the insured should have the choice of six methods of settlement. Plaintiff paid his premiums for twenty years as agreed. The contract consisted of the application and the policy and provided, among other things, as follows:

“VI. TONTINE PROFITS.

At the end of the Tontine Period, if the person proposed for assurance be then living, and the policy in force, the policy shall participate in the accumulated surplus derived from policies on the Free Tontine plan, both existing and discontinued, as may then be apportioned by the Society.”

“VII. CHOICE OF PRIVILEGES AT THE END OF THE TONTINE PERIOD.

The policy may then be surrendered for its full value, consisting of the entire reserve and the surplus then apportioned by the Society—Either in 1, Cash, or, 2, Paid-up Assurance, or, 3, An Annuity for Life. Or, if the policy is not an endowment maturing at the end of the Tontine Period, it may be continued and the surplus taken—either in 1, Cash, or 2, Paid-up Assurance, (To be added to the Policy), or 3, An Annuity, (To reduce or extinguish premiums if still payable).

“But it is expressly understood, that for all paid-up assurance in excess of the amount of the original policy, or issued in lieu of a matured endowment, a satisfactory medical certificate shall be furnished to the Society.”

The petition alleged that plaintiff had done all the things required of him by his contract with the defendant; that he had elected to settle by taking a paid-up policy under his contract; that the defendant company had agreed with plaintiff when the policy was issued that should he adopt such method of settlement that the amount of paid-up insurance to which he would be entitled on said 11th day of December, 1913, was the sum of eighteen hundred and thirty (\$1830) dollars, and prayed the court that defendant be required to issue to him a fully paid-up policy of insurance in said sum.

In support of the allegations of his petition plaintiff introduced the following writing, referred to as a "green slip," which was attached to the policy:

"Free to _____ Illustration Blank. For a — 2 ——— Payment Life Policy, with ——— pending Tontine period.

N. B. This blank must be filled up from the Book of tables issued during the current years by the Equitable Life Assurance Society of the United States, and based on the Society's experience on different forms of Tontine assurance, up to 1893.

It is impossible to predict the results of the future, but from the tables referred to above it is easy to show approximately the amount of surplus profits which would now be payable on a Tontine Policy of the Equitable Life Assurance Society of the United States if it had been issued in the past and ended its Tontine period at the present time. While the results of the future must necessarily depend on the experience of the future (and although some variation must be expected in view of a lower rate of interest and of other modified conditions which affect all like companies and, in a measure, all branches of financial business), figures based on past experience furnish the best attainable data upon which to judge the management of the Society and the value of its Tontine policies.

The following figures given on this basis, are therefore deserving of careful examination:

ILLUSTRATION.

Amt. of policy, \$1,000. Tontine period, 20 yrs.
Kind, 20 A. P. Age 24. Annual Premiums, \$27.60. Total premiums paid in 20 years \$552.00.

OPTIONS AT END OF TONTINE PERIOD.

1, Cash value consisting of reserve	
\$404.00 and surplus \$334.00 . . . \$	738.00
or, 2, Paid-up values* \$	1830.00
or, 3, Cash surplus \$	334.00

(Or Life Annuity for amount surplus will purchase, Original policy now being fully paid up).

GRD E. JOHNSON, Agent, Gen'l Agent.
Dated at Kirksville, Mo. 11-12-1893.

*When the paid-up value exceeds the amount of the original policy the assured has the privilege of taking a paid-up policy for the full amount of the original policy, and of drawing the cash value of the excess, subject to a satisfactory medical certificate of good health."

The figures in the foregoing illustration were inserted by the general agent of defendant at Kirksville, Mo.

Plaintiff claims that this "green slip" was a part of the policy and guaranteed to him paid-up insurance in the sum of eighteen hundred and thirty (\$1830) dollars: Defendant claims that it was a mere illustration, or estimate, and was never intended by it to be a part of the contract, or a guarantee of any kind.

"Tontine insurance is a form of life insurance by which the policy holder agrees, in common with the other policyholders under the same plan, that no dividend, return premium, or surrender value shall be received for a term of years called the tontine period, the entire surplus from all sources being allowed to accumulate to the end of that period, and then divided among all who have maintained their insurance in force." [25 Cyc. 700.]

Under this policy if the insured survived the stated period of twenty years, the amount of additional insurance that he might elect to receive was in its nature uncertain, and in the nature of things incapable of being computed in advance. The amount of the surplus earned on this policy was necessarily contingent and could only be determined when at the end of the tontine period the aggregate of the fund by accretions, dividends, lapses, interest, etc. could be ascertained for division among the survivors: The very nature of the policy made it impossible to tell what the accumulated surplus derived from like policies would be. The application for the policy stated that it and the policy taken together shall

constitute the entire contract between the parties, and that "the distribution of surplus which may be adopted and approved by the Society is hereby accepted by me in my own behalf and for every person who shall have any interest in the policy now applied for."

The policy further provides that dividends will not be apportioned until December 11, 1913, and that the surrender value of the policy shall consist of the entire reserve, amounting to four hundred and four (\$404) dollars, together with the surplus then (meaning Dec. 11, 1913) apportioned by the Society.

The policy was executed at the home office, signed by the officers of the company and by Gid E. Johnson, General Agent, who solicited insurance and collected insurance premium for defendant at Kirksville Missouri. It seems to me the foregoing provisions in the application for the policy, and the policy itself, together with the terms of the "green slip," show conclusively by even a casual reading that it was not the intention of the defendant to guarantee to plaintiff any specific amount of additional insurance: The "green slip," as described therein, is an illustration, and it is stated expressly that "it is impossible to predict the results of the future," and that the tables referred to show *approximately* the amount of surplus profits which would (that is, at the date of the issuance of the policy) be payable on a Tontine policy of the defendant, if it had been issued in the past and ended its Tontine period at the present time (that is, twenty years prior to the end of the Tontine period of the policy sued on in the case at bar.)

It has been held in numerous cases that prospectuses, illustrations, statements and papers giving estimates or predictions, only, of future earnings of policies, given or sent to insured with his policy, are not a part of the policy itself unless made so by the terms of the policy or the application therefor. [Truly v. Insurance Co., 66 So. 970; Tourtellotte v. Insurance Co., 155 Wis. 455; Untermeyer v. Insurance Co., 113 N. Y. Supp. 221; MacIntyre v. Insurance Co., 82 Ga. 478; Grange v. Insurance Co., 235 Pa. 320; Williams v. Insurance Co., 122 Md. 141;

Provident Savings Life Assurance Society v. Withers, 132 Ky. 541; Langdon v. Northwestern Life Insurance Co., 199 N. Y. 188.]

The only apparent exception to this rule that I have been able to find is the case of Forman v. Insurance Co., 173 Ky. 547. This case is the only one cited in the majority opinion in connection with this branch of the case. The majority opinion is based wholly on this Kentucky case. Although this Kentucky case is an extreme one and it may be assumed with a good deal of reason that it is not in harmony with the great weight of authority on the subject, I am willing to follow the Kentucky court in reference to the matter. However, I am not willing to extend the rule laid down in the Kentucky case cited, especially where the evidence does not justify any such extension. In the Kentucky case referred to there was a paper called an illustration, used by soliciting agents. This paper was exhibited to Forman at the time he was solicited for insurance. The language of the illustration in the Forman case is somewhat different from that used in our "green slip."

However, the difference in language is not by any means the principal difference between the Forman case and ours. In the Forman case when the illustration was presented by the soliciting agent at the time he was soliciting the insurance Forman stated that this illustration appealed to him, but that he wanted some head officer of the company to approve it before he accepted the insurance. So the agent forwarded the illustration to the head office at New York City and it was returned to plaintiff attached to the policy, having these new words added to the illustration, as follows, "Please endorse as correct." These words were put on the illustration by the soliciting agent asking the head office to endorse the correctness of the illustration. The illustration was thereafter endorsed by the signature of F. Schroider, Assistant Secretary of the Company, being the same person who had signed the policy itself. The Forman case shows that the insured in ac-

cepting the policy understood, on account of the company expressly guaranteeing *in writing* that the illustration, including the amount of money mentioned therein, was correct, that when the option period arrived he would have the right to select one of the amounts specified in the illustration.

It will be thus seen that in the Forman case there was what amounted to an agreement with the company by its head officers in New York guaranteeing to the insured *in writing* that he would receive the amount of money mentioned in the illustration. I cannot see how the facts in that case can be in any way compared to those in our case. In our case there is no evidence that the plaintiff ever saw the "green slip" at all until after the policy was delivered.

Even under the Forman case, in order to make a case of this kind four things must be conclusively established: First, a definite promise to pay a certain and definite amount of money and an acceptance of such a promise by the insured; Second, this promise to be the consideration without which the insured would not have taken the insurance; Third, the promise to pay the amount claimed, to be in writing, otherwise it would contradict and add to the written application; Fourth, an oral or written agreement that this writing should become a part of the policy.

How does the case made by plaintiff measure up to these requirements? First. I am of the opinion that the evidence fails to show that the agent at the entering into of the written application or at any time before the delivery of the policy, or, in fact, after the delivery, told plaintiff that he was to get eighteen hundred and thirty (\$1830) dollars. Second: I do not think that there is any evidence in the record that any statement made by the agent to plaintiff at the time he applied for the insurance was the cause of plaintiff making such application. However, if it be conceded that the agent in soliciting the insurance told plaintiff that he was to get \$1830 and plaintiff relied upon such a representation, then the third and fourth requisites are

absent. Third: The application was in writing. In it plaintiff requested Tontine insurance. Tontine insurance is a kind of insurance where the surplus is not to be ascertained until the end of the Tontine period, consequently plaintiff agreed *in writing* that he would wait until twenty years to see what he was to get. Besides this, in the application he stated that all oral matters were merged into the application. Unless the agreement to pay \$1830 was in writing (even though it could be said that such a written agreement could be identified and added to the contract by parol), then it was of no effect as it would change and add to a written agreement. (The application). Fourth: There is no claim that the agent told plaintiff that this alleged oral agreement was to become a part of the policy.

But this is not all. Even if could be said that the "green slip" was a part of the policy, the duty would devolve upon us to construe the meaning of the language used therein. The language used in the "green slip" shows upon its face that no amount was guaranteed, to say nothing of \$1830. Plaintiff applied for tontine insurance and in his petition he says that this policy was for tontine insurance. Under tontine insurance it is impossible to tell at the time the policy is written what the policy and like policies will earn in the next twenty years. This court must construe the insurance contract as written. If we construe this whole contract as written, and assume that the "green slip" was a part of it, there can be no conclusion but what the contract was not an agreement to pay any certain sum of money. The "green slip" not only does not guarantee any specific sum of money but it says "it is impossible to predict the results of the future."

I think under the pleadings in this case it is not possible for us to enter into the consideration of the question whether a fair accounting would show that plaintiff was entitled to \$1830, as the petition is not for an accounting but a suit upon an agreement to pay \$1830. Therefore, I cannot agree with what is said in the majority opinion in reference to this matter.

But, even admitting that we can consider the matter of accounting, then I disagree with what is said about it. The majority opinion in support of its holding that plaintiff may force the defendant to an accounting states, quoting from the case of *Equitable Life Assurance Society v. Winn*, 137 Ky. 641, that: "The company cannot satisfy its contract by saying that it apportioned to the policy all that was due under it. *It must show what was due under it—how ascertained, and from what sources*, else it becomes the judge as well as contracting party." Whatever the law may be in Kentucky, our Supreme Court has held on two occasions that a policy holder cannot force an accounting with an insurance company in a proceeding brought directly for that purpose. [*State v. Insurance Co.*, 229 Mo. 187; *State v. Insurance Co.*, 245 Mo. 78.] However, as I have already said, in my opinion, this is not a suit for an accounting.

It is urged by plaintiff that even though this court find that the "green slip" cannot be considered as a part of his contract with the defendant, that, nevertheless, he is entitled to paid-up insurance in the sum of eighteen hundred and thirty (\$1830) dollars, and he says that the evidence which will prove this fact, being the books of the defendant, is peculiarly within the knowledge of the defendant, therefore the burden of proving that he is not entitled to the sum that he claims is upon the defendant. In urging this point plaintiff says that the "green slip" is admitted by the defendant to be a correct statement of what a similar policy to that held by plaintiff would have been entitled to had it run for the twenty years prior to the 15th day of December, 1893, the date of the issuance of the policy sued on, and for that reason it is some evidence as to what was earned by the company for the twenty years since December 15, 1893, and of which plaintiff is entitled to under his policy; that having proven these facts, the burden shifts upon the defendant to show that plaintiff is not entitled to said policy in the sum of eighteen hundred and thirty (\$1830) dollars.

Whether the rule attempted to be invoked by plaintiff in this case is applicable as thought by the majority opinion, the record shows that the defendant did prove that under the provisions of its contract with plaintiff, that plaintiff was only entitled to an additional amount of paid-up insurance in the sum of three hundred and seventy (\$370) dollars, and defendant tendered to plaintiff an additional policy in the sum of three hundred and seventy (\$370) dollars and deposited the same in court for the use of plaintiff.

The petition in this case does not allege, nor does the proof show, any fraud or imposition practiced upon the plaintiff by which he was induced to accept the policy, nor that there was any fraudulent suppression or omission of any part of the agreements between plaintiff and defendant, nor does plaintiff allege or prove that there was any mistake in the contract of insurance which was mutual, or which resulted in mutual error.

Plaintiff in his application for insurance and in the policy agreed that the policy shall participate in the accumulated surplus derived from policies on the Free Tontine plan, both existing and discontinued, as may then (that is, on Dec. 11, 1913) be apportioned by the Society. There is no allegation that the Society improperly, fraudulently or mistakenly made the computation which plaintiff agreed that it should make; nor is there any allegation that there was not a fair and equitable distribution of such surplus. In fact, the petition alleges a cause of action wherein it is stated that the defendant agreed that it would issue to plaintiff at the end of the Tontine period a policy in the sum of eighteen hundred and thirty (\$1830) dollars, and whether the defendant has fairly or equitably apportioned the surplus is immaterial in this case.

The contract does not provide that the company may arbitrarily give to plaintiff the amount of money it sees fit, but it provides that at the end of the Tontine period the policy shall participate in the accumulated surplus derived from policies on the Free Tontine plan, both existing and discontinued and, further, that this

amount is to be apportioned by the Society. What plaintiff was to get is certain. He was to get his part of the accumulated surplus, only the manual work of computing what that amount would be was left to the company. The company made the computation in this case and showed that plaintiff was not entitled to eighteen hundred and thirty (\$1830) dollars, and there is neither pleading nor proof that the calculation was improperly, unfairly, inequitably or mistakenly made by the company.

I cannot see under what theory plaintiff is entitled to recover in this case. Reduced to its last analysis: This case is nothing more than an effort on the part of a party to a written contract consisting of an application and a policy of tontine insurance, which says that the surplus cannot be ascertained for twenty years after its date, with a "green slip" attached thereto that, likewise, plainly on its face purports to be an estimate and with no guarantee whatever, attempting, by oral evidence that, in my opinion, is so indefinite that no one can really tell what it means, to contradict by parol the written agreement by saying that the agent soliciting the insurance (although he was a general agent), whose lips are sealed in death, told him verbally that the contract was something other than what was written.

I think the judgment should be reversed.

E. R. SPAW, Appellant, v. KANSAS CITY TERMINAL RAILWAY COMPANY, a Corporation, and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Kansas City Court of Appeals, January 28, 1918.

1. **NEGLIGENCE: Federal Employers' Liability Act: Exclusive Remedy.** When the facts and circumstances surrounding an injury to an employee of a railroad engaged in Interstate Commerce bring the case within the provisions of the Federal Employers' Liability Act, such act is supreme and excludes every other remedy.

Spaw v. K. C. Terminal Ry. Co.

2. ———: **Liability of Lessee Railroad: Interstate Commerce.** If an employee of a lessor railroad is injured while engaged in work, which, at one and the same time, was not only a part of the general interstate commerce of such lessor but also of the particular Interstate Commerce being carried on by the lessee, then such injured person would, at the very time of his injury, be engaged in the Interstate Commerce of both roads, and would be an "employee" of both roads within the meaning of the Interstate Commerce Act.
3. ———: **Federal Employers' Liability Act: Limitations.** An action for damages for negligence of a railroad commenced more than two years after the injury occurred cannot be maintained when the facts bring the case within the Federal Employers' Liability Act.
4. ———: **Interstate Commerce.** When the work being done at the time of the injury is such that it directly affects or facilitates the carriage of Interstate Commerce, then the injured employee is engaged in such commerce.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

AFFIRMED.

Handy & Swearingen for appellant.

Fred S. Hudson, S. W. Sawyer and J. R. Bell for respondent.

TRIMBLE, J.—Plaintiff brought this action, under State law, against both defendants to recover damages for an injury inflicted upon his eye by a red hot cinder emitted from an engine of the defendant, Milwaukee railroad, as the result of the alleged negligent maintenance and use thereon of a defective smoke consumer and cinder arrester. The petition alleged that the Milwaukee railroad was operating its trains over the tracks of the Terminal railroad as a lessee for hire.

At the close of plaintiff's case and also at the close of all the evidence, both defendants demurred separately, each asking a peremptory instruction to find in its favor. In urging the final demurrers, the defendants expressly raised the point that the evidence showed the case to be governed by the Federal Employer's Lia-

bility Act. The demurrers were overruled and the case was submitted to the jury which returned a verdict for \$7500 against both defendants. Afterwards, the court sustained their separate motions for new trial, the reason assigned for such action being that "the court erred in not sustaining the demurrer of defendants to plaintiff's evidence." Whereupon plaintiff duly appealed.

The injury occurred, and the cause of action accrued, April 24, 1913, but the suit was not brought until August 28, 1915. Consequently, if the cause of action is controlled by the Federal Act, as to both defendants, the plaintiff has no case since suit was not brought within two years. [36 U. S. Statutes at Large, p. 291, chapter 143; *Atlantic Coast Line Railroad v. Burnette*, 239 U. S. 199.] The vital question, therefore, is whether or not the facts of the case bring it under the Federal Act?

The defendant Terminal Company owned the old Union Depot in Kansas City, Missouri, together with a line of railroad around said city with tracks leading to said Union Depot and connecting with practically all of the many trunk line railroads entering Kansas City. Nearly all passenger trains entering and leaving Kansas City used the said depot and the Terminal railway tracks. In fact all the trains, freight as well as passenger, of nearly all the great trunk lines entering Kansas City used the tracks of, and the terminal facilities afforded by, the said Terminal company. The defendant Milwaukee Railway Company was one of these trunk lines, and, under a contract with the Terminal Company, operated its trains over the latter's said tracks. Among them was a Milwaukee passenger train No. 8 which ran from Kansas City to Chicago via Ottumwa, Iowa; and Milwaukee Engine No. 3106 was the regular engine which pulled this train out of Kansas City on its interstate journey. According to plaintiff's evidence it was the regular engine assigned to that train provided it met with no accident, and the record does not show that it was used in any other

service. Preparatory to taking train No. 8 out on its journey, said engine No. 3106 regularly left the Milwaukee roundhouse near the eastern limits of Kansas City every morning about 7:40, stopped at the yard of the Milwaukee company, known as the Broadway yard, where it coupled on to the passenger coaches making up said train No. 8, and then proceeded immediately to the Union Depot where the train received its passengers and then left on its journey. In thus going from the roundhouse to the Union Depot and thence out of the city, the Terminal company's tracks were used.

Plaintiff was the General Yard Master of the Terminal Company, and his duties included the supervisory charge of the operation of all trains using the Terminal company's tracks, the direction of affairs following wrecks and accidents thereon, and included the clearing of the tracks so that general traffic would not be hindered or obstructed.

On the day of plaintiff's injury, while said Milwaukee train No. 8 was proceeding from the Broadway yard to the Union Depot, its engine No. 3106 was derailed about one-and-one-half miles from said depot. Plaintiff, as General Yard Master of the Terminal Company, was notified and immediately took charge of the situation. The Milwaukee had sent another engine which had arrived on the scene when plaintiff reached the spot. Plaintiff ordered the train to be uncoupled from the derailed engine and had it attached to the other engine so as to take the train out of the way and on to the depot for its passengers. By direction of the Milwaukee Yardmaster who was present at first, but who shortly after went away, the crew on the derailed engine traded places with the crew on the other engine and train No. 8 went on to the depot where, after securing its passengers, it left on its interstate trip.

In the meantime plaintiff was endeavoring to get the derailed engine back on the track and to clear the Terminal tracks so that general business could be dispatched thereover. According to plaintiff's testimony the derailed engine was tying up the Terminal's busi-

ness, and there were trains standing headed both ways waiting to get by the wreck.

After train No. 8 with its new engine had gone on to the depot, plaintiff had two engines endeavoring to pull the derailed engine on to the rails again, but, to do so, it was also necessary for the derailed engine to greatly exert its own power. When the signal was given for the concerted action of all three engines, the engineer on the derailed engine applied its power to the utmost, throwing the throttle wide open and causing a heavy exhaust of steam to be thrown out of the smoke stack, during which plaintiff got a cinder in his eye.

As the Terminal railway tracks and facilities were used and necessary in the transportation of persons and property by the "trunk line railroads" which entered Kansas City, the said defendant Terminal railroad was engaged in interstate commerce. [United States v. Union Stock Yard & Transfer Co., 226 U. S. 286; Ohio Railroad Commission v. Worthington, 225 U. S. 101; Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; Trowbridge v. Kansas City, etc., R. Co., 192 Mo. App. 52; Interstate Commerce Act, as amended June 29, 1906, 34 Stats. at Large, p. 584, chapter 3591.] All railroads in this State are required to engage in interstate commerce, and it would seem that, even if the record were silent as to the nature of the commerce carried on by the "trunk line railroads entering Kansas City," still we might be able to take judicial knowledge that such trunk lines were engaged in interstate commerce. [State v. Missouri Pacific R. Co., 212 Mo. 658.] However, the record shows affirmatively that both defendants were railroad corporations and that they were engaged in interstate commerce, The Milwaukee is clearly an interstate railroad, and not only were cars transferred between it and the other trunk lines over the Terminal railway's tracks, but the Milwaukee interstate train No. 8 was operated over them daily, and its derailment, necessitating the work in which the injury was received, occurred on said Terminal

tracks. The two defendants were common carriers engaged in interstate commerce.

But the cause of action is not within the Employer's Liability Act unless the injury occurred "when the particular service in which the employee is engaged is a part of interstate commerce." [Illinois Central R. Co. v. Behrens, 233 U. S. 473.] Hence, the question arises was plaintiff engaged in interstate commerce at the time he was injured? Clearly he was as to the defendant Terminal Company because he was then engaged in *clearing the tracks* of said company in order that transportation thereover might not be hindered or impeded. The tracks being indispensable to the interstate commerce in which the defendant Terminal railroad was engaged, the clearing thereof was not a matter of indifference to such commerce, but was "so closely connected therewith as to be a part of it." [Pedersen v. Deleware, etc., R. Co., 229 U. S. 146, 151.] The authorities all hold that when the work being done is such that it directly affects or facilitates the carriage of interstate commerce, then the employee is engaged in such commerce. [New York Central R. Co. v. Winfield, 244 U. S. 147; 37 U. S. Sup. Ct. Rep. 546; Southern R. Co. v. Puckett, 37 U. S. Sup. Ct. Rep. 703; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352; Hardwick v. Wabash R. Co., 181 Mo. App. 156; Christy v. Wabash R. Co., 191 S. W. 241.]

Again, train No. 8 was an interstate train, and it had started on its regular interstate trip, since the bringing of the train to the depot was the necessary preparatory step to the principal interstate movement. [North Carolina R. Co. v. Zachary, 232 U. S. 248; New York Central, etc., R. Co. v. Carr, 238 U. S. 260.] However, it will doubtless be said that the injury did not occur until *after* plaintiff had disconnected the train from its derailed engine and had sent said train on its way; and that, at the very time of the injury, plaintiff was merely engaged in the work of assisting the derailed engine to get back on the rails and return to its roundhouse. No doubt he was doing this, but such was not the main purpose nor the full result of

his work which, as stated, was to clear the tracks so as to allow trains which were waiting to pass the wreck. But, even in thus replacing the engine on the rails was he not assisting in the interstate commerce carried on by the Milwaukee? This engine was the one regularly assigned to this interstate daily train, and, so far as the record shows, it was not used in any but interstate service. Hence, in restoring it to the track so that it could be returned to the roundhouse and be there repaired, such work was upon an instrumentality of interstate commerce which was temporarily disabled but which would, upon restoration, at once go back into such service, and, therefore, plaintiff was engaged not only in the general interstate commerce carried on by the Terminal road but also in the particular interstate commerce which the Milwaukee was carrying on, or attempting to carry on, by means of this particular interstate engine and train. The fact that after said engine No. 3106 had started on the interstate journey it ran off the track and had to be returned to the roundhouse for repairs, does not change the fact that its reinstatement upon the rails in order to accomplish its return to the roundhouse was as much a part of the Milwaukee's interstate commerce as the bringing of the engine and train to the depot before its principal interstate movement. It was an incident connected with that interstate commerce necessarily arising by reason of the happening of the derailment during the progress of the trip. It was, therefore, a part of that work. [*Erie R. Co. v. Winfield*, 244 U. S. 170, 37 I. S. Sup. Ct. Rep. 556; *Baltimore, etc., R. v. Darr*, 204 Fed. 751; *Law v. Illinois Central R. Co.*, 208 Fed. 869.]

But it is said plaintiff was an employee of the Terminal Company and not of the Milwaukee, and it is therefore, urged that the Employer's Liability Act has no application to the latter railroad. It is true, the liability created by the Act is a liability to the employee of the carrier and not to others. [*Robinson v. Baltimore, etc., R. Co.*, 237 U. S. 84, 91; *Chicago Rock Island, etc., R. Co. v. Bond*, 240 U. S. 449.] But, under sections 3078

and 3079, Revised Statutes 1909, the lessor or licensor, Terminal Railway Company, is held liable for the negligent acts of the lessee or licensee, the Milwaukee Company. [Markey v. Missouri River R. Co., 185 Mo. 348; Dean v. Kansas City, etc., R. Co., 199 Mo. 386; Fleming v. Louisiana, etc., R. Co., 263 Mo. 180; Brown v. Louisiana, etc., R. Co., 256 Mo. 522.] And on the other hand the lessee or licensee, Milwaukee Company, is held liable for the negligent acts of the lessor or licensor, Terminal Company, at least for the negligent acts of the lessor or licensor in doing those things for the lessee or licensee which the latter would have to do if it owned the track. The applicable portion of section 3079 is as follows:

“Whenever any such railroad, street railway, or other railway company or corporation, or any receiver thereof, shall lease its road or track or any part thereof to any other company or corporation, or shall license or permit any other company or corporation, under any running agreement, to run cars, engines or rolling stock upon its road or track, in this State, the company or corporation so leasing its road, or such part thereof, to such other company or corporation, or so licensing or permitting the use of its road or track by such other company or corporation, shall remain liable for all acts, debts, claims, demands, judgments and liabilities of the lessee or licensee, or any sublessee or sublicensee, company or corporation, the same as if it (the lessor or licensor) operated the road, or such part thereof, itself; and such lessee or licensee shall likewise be held liable and may sue and be sued in all cases and for the same causes, and in the same manner, as if operating its own road.”

The theory and purpose of such law is to prevent a railroad from evading the responsibility involved in the exercise of its corporate functions by delegating the operation of its road to another. Nor can a railroad avoid such responsibility by using the tracks of some other railroad. In other words, the effect of such law is to make the road that owns the track and the road

that uses it *joint operators* of the highway thus existing, so far the duties and responsibilities involved in the exercise of railroad corporate functions are concerned. It would seem to follow that if an employee of the lessor or licensor was injured while engaged in work which, at one and the same time, was not only a part of the general interstate commerce of the lessor or licensor but also of the particular interstate commerce being carried on by the lessee or licensee, then such injured person would, at the very time of his injury, be engaged in the interstate commerce of both roads, and would be an "employee" of both roads within the meaning of the Interstate Commerce Act. [North Carolina R. Co. v. Zachary Admr., 232 U. S. 248.] In this case it was held that an employee of an interstate lessee railroad, injured, while engaged in its interstate commerce, by the negligence of such lessee, was an "employee" of the lessor railroad within the meaning of the Federal Act, notwithstanding the fact that the latter railroad lay wholly within the limits of a single State. Since the State statute makes the two railway companies, in the case at bar, joint operators of the road, each responsible for the acts of the other in performing their corporate functions as a railroad, at least within the limits hereinabove defined, and makes the equipment of the lessee the equipment of the lessor, and the road-bed of the lessor the road-bed of the lessee, and the employees of each, the employees of the other, with respect at least to the performance of the common functions of each railway company as a public carrier; and since the Federal statute makes any common carrier engaged in interstate commerce liable for injury to persons employed by it in such commerce, due to negligent defects in, or negligent operation of, either equipment or road, then it follows that the Federal Act makes each, the lessor and lessee, liable for injuries to the employees of the other, received while engaged at the time in interstate commerce, whether caused by defects in or the negligent operation of either the lessor's road or the lessee's equipment. Consequently,

plaintiff is, by virtue of local law, to be regarded as the agent and employee of both roads, and as both were engaged in interstate commerce and plaintiff was, at the time of his injury, engaged in the interstate commerce of both roads, he will be regarded by the Federal law as an employee of both and his right of action for the injury is governed and controlled exclusively by the latter law.

The case of *Robinson v. Baltimore and Ohio R. Co.*, 237 U. S. 84, is not contrary to the position we herein take, since in that case the plaintiff was a Pullman porter and was not in any sense an agent or servant of the defendant railroad company in the performance of any of its functions as a common carrier, and the railroad had in no way made the Pullman company its agent to perform such functions. Hence, the porter could not be regarded as an employee of the railroad within the meaning of the Act. Nor can the case of *Chicago, etc., R. Co. v. Wagner*, 239 U. S. 452, be regarded as in point here. Because in that case plaintiff's cause of action was not based upon his status as an employee entitled to recover under the Liability Act. He did not sue his immediate employer, nor was any claim made that such immediate employer was, by virtue of local law, an agent of the defendant Alton railroad in the performance of its functions as a common carrier. In addition to all this, it was conceded and agreed upon at the trial "that the action was not governed by the Federal statute." [239 U. S. 456.]

We are, therefore, of the opinion that plaintiff's cause of action is, as to both defendants, governed and controlled by the Federal Act. It is well established that when such Act does apply it is supreme and excludes every other remedy. The subject of liability is so completely covered as to prevent recovery under any other law. [Second Employer's Liability cases, 223 U. S. 1; *New York Central, etc., R. Co., v. James Winfield*, 244 U. S. 147, 37 U. S. Sup. Ct. Rep. 546; *St. Louis, etc., R. Co. v. Seale*, 229 U. S. 156.]

It is urged that if defendants desired to claim the benefit of the Federal Act they should have offered evidence in support of such claim and submitted the questions thus involved to the jury by instructions. But it is not necessary for the defendants to offer evidence when, as here, the plaintiff's evidence discloses all that is necessary. [Roberts on Injuries to Interstate Employees, Sec. 51.] Even if the petition states a case under the State statute, yet if, upon the evidence, it appears that the case is controlled by the Federal Act and the defendant has duly excepted, the court must take notice of the exception. [St. Louis, etc., R. Co. v. Seale, 229 U. S. 156.]

The judgment of the trial court is affirmed. All concur.

UNITED IRON WORKS COMPANY, Plaintiff, v.
SLEEPY-HOLLOW MINING AND DEVELOPMENT COMPANY et al., FOREST LUMBER COMPANY, (Appellant), OSCEOLA LEAD AND ZINC MINING COMPANY, (Respondent), Defendants.

Springfield Court of Appeals, November 13, 1917.

1. **MORTGAGES: Priorities: Mechanics' Liens.** A valid mortgage given by the owner of property constitutes a lien superior to liens arising under contract made by the mortgagor subsequent to such mortgage, and this applies to a subsequent mechanic's lien, though the value of the security was increased by the labor or material of the mechanic's lien claimant.
2. **CHATTEL MORTGAGES: Effect: Removal of Property.** Personal property, though subject to a chattel mortgage, may be moved at will by the mortgagor; such removal at most only subjecting the mortgagor to foreclosure.
3. **——: Removal of Property: Lien.** The removal of personal property which was subject to a chattel mortgage to another locality and county will not destroy the mortgage lien or subordinate it to a subsequent one.

United Iron Works Co. v. Min. and Dev. Co.

4. ———: **Priority: Mechanics' Liens.** As there are no provisions for the severing of subsequent additions or improvements in the case of mortgages on personalty or chattels real, so as to allow the enforcement of mechanics' liens only against the betterments or to the extent of the enhanced value, as are made by Revised Statutes 1909, secs. 8215, 8216, 8219, for the severance of improvements from land, one holding a chattel mortgage on a concentrating mill takes priority over a subsequent mechanic's lien claimant who performed labor and furnished material in the removal of the mill from one point to another, and its subsequent re-building, the structure as rebuilt preserving its identity with the original structure.
5. ———: **Priority: Mechanics' Liens: Equitable Estoppel.** In such case, the chattel mortgagee cannot be denied priority on the theory of estoppel or ratification of the contract with the mechanic's lien claimant merely because the chattel mortgage provided that the concentrating mill could be moved and rebuilt at another point, for, except for the provision prohibiting removal under penalty of foreclosure, the mortgagor was entitled to remove the mill, and the purpose of the clause was merely to identify the structure in its new and old locations.

Appeal from Newton County Circuit Court.—*Hon. Charles L. Henson*, Judge.

AFFIRMED.

H. S. Miller for appellant.

George V. Farris for respondent.

STURGIS, P. J.—This suit having various parties defendant was brought under section 8235A, Laws 1911, page 314, for the purpose of having determined the various rights, interests and liens of the various mechanic's lien claimant and claimants of other liens and owners with respect to a certain mining plant then situated on leased premises in Newton County, Missouri. The rights of all the parties, other than the Forest Lumber Co., appellant and the Osceola Lead and Zinc Mining Company, respondent, have been adjusted and this suit terminated as to them. The appellant, Forest Lumber Company, sought to enforce a mechanic's lien against said property and the respondent, the Osceola Company, resists the same

on the ground that a certain mortgage on said property was a valid prior lien thereon and that this respondent now owns said property as purchaser under said mortgage free from any such mechanic's lien. The appellant states and respondent concedes that the only question for decision on this appeal is whether or not the mechanic's lien of the appellant is prior in right to the mortgage lien and the the purchaser's title thereunder. The trial court held the mortgage lien to be prior to the mechanic's lien and entered judgment declaring the Osceola Company, respondent, to be owner of such property free from any rights of the Forest Lumber Company, appellant.

We may properly view this case as a contest between the mechanic's lien claimant and the mortgagee for priority of lien in which neither party questions the validity or amount of the other claimant's lien. The rights of these contending parties grow out of the following facts: The LeRoy Mining Company was owner of a certain mining plant and concentrating mill located on land in Jasper County, Missouri. On October 21, 1913, that company sold said mining plant as personalty to the Sleepy-Hollow Mining and Development Company. This purchasing company made a cash payment on the purchase price and gave a chattel mortgage of that date to the LeRoy Company, to secure the balance of the purchase price, in which the property is described as follows: "One concentrating mill which now is located on the Southwest quarter of the Northwest quarter of section 7, Township 27, Range 32, but will be immediately moved and rebuilt on the West half of the Southeast quarter of section 24, Township 27, Range 33, Newton County, Missouri, and agrees to keep said mill insured in some reliable fire and tornado insurance company for at least \$800 to be payable in case of loss to the said J. F. Todd, Trustee of the LeRoy Mining Company." This chattel mortgage was properly filed and recorded in Jasper County where both the mortgagor and mortgagee resided. The mortgagor thereafter dismantled the mining plant and moved

it to and rebuilt it on the land in Newton County. It was moved by being torn down and loaded on wagons but being kept in sections so far as practicable. The lien claim of the appellant, Forest Lumber Company, is for lumber and material sold by it to the mortgagor and used in rebuilding the plant in Newton County. The question is, does the lien of this materialman take precedence over, or is it subordinate to, the mortgage lien already on this property? Default was made in the secured debt and the mortgage was lawfully foreclosed and respondent became the purchaser. The appellant says there is no question of innocent purchaser in the case, and we think this is true, since the appellant, constructively at least, had knowledge of the mortgage when it sold and furnished the material used in rebuilding the plant and the respondent when it purchased under the mortgage knew as did the mortgagor that the plant was to be and had been moved from Jasper County and that lienable work and material would be and had entered into its rebuilding.

There can be no doubt of the general rule that a valid mortgage given by the owner of property constitutes a valid lien thereon prior and superior to liens arising under contracts made by the mortgagor subsequent to such mortgage. [Jones on Chattel Mortgages (5 Ed.), sec. 478, 472; Hampton v. Seible, 58 Mo. App. 181; Stone v. Kelley, 59 Mo. App. 214; Vette v. Leonori, 42 Mo. App. 217, 224; McAdow v. Sturtevant, 41 Mo. App. 220, 230; Schulenburg v. Hayden, 146 Mo. 583, 591, 48 S. W. 472.] In 27 Cyc., p. 236, the law is stated as follows: "Where the property is subject to a mortgage at the time of the accrual of the mechanic's lien, such mortgage retains its priority and the mechanic's lien is postponed thereto, notwithstanding the fact that the value of the mortgage security is increased by the labor or material of the mechanic's lien claimant, or that the building is so changed that very little of the original structure remains."

The property mortgaged being personal property could be moved at will by the mortgagor, such re-

removal at most subjecting him to having the mortgage foreclosed; so that the lien of the mortgage having once attached, the subsequent removal of the property to another locality and county would in nowise destroy the mortgage lien or subordinate it to a subsequent lien. [McNichols v. Fry, 62 Mo. App. 13, 17; Jones on Chattel Mortgages, sec. 260.]

There is some conflict in the evidence as to the extent to which the mining plant was converted into raw material and lost its identity in the process of removal; but the trial court was justified in finding that practically all the material and parts as it stood when the mortgage was given were used for a similar purpose in the rebuilt structure; that the mining plant was a complete structure as it stood in Jasper County and little or no change was made in rebuilding it; that it was the same size and on the same lines as rebuilt; that the mill was made of good material, and, while it could not be moved except to tear it down and haul it in wagons, yet it could be rebuilt without the use of very much new material. One witness said the lumber was the same in the rebuilt mill excepting the repairs; that some boards were broken or damaged in taking it down or lost in moving or reconstructing and these were replaced by new boards.

The appellant relies on a line of cases holding that where the mortgage covers a structure unfinished and incomplete at the time the mortgage is executed, then material and labor furnished to finish and complete the same afford the foundation for a prior lien. [Hall v. Manufacturing Co., 22 Mo. App. 33; Hall v. Mullanphy Planing Mill Co., 16 Mo. App. 454; Reed v. Lambertson, 53 Mo. App. 76, 79.] But the prior mortgage takes precedence over liens for repairs or for work or materials used in enlarging, remodeling or replacing parts of a completed structure. [Hall v. Planing Mill Co., 16 Mo. App. 454, 458; Haeussler v. Thomas, 4 Mo. App. 463, 467; Dugan v. Scott, 37 Mo. App. 663.]

If the present case should be decided on the above theory we must affirm the judgment, for the court was

justified in finding that the materials furnished were not to complete an unfinished improvement in process of construction when the mortgage was given. Had the mining plant remained at its location in Jasper County, being a completed plant at the time it was mortgaged, it is plain that the mortgagor could not by any sort of improvement create a lien superior to that of the mortgage.

All the above cases deal with real estate mortgages which cover buildings only because and when such buildings are a part of the real estate. Our Statutes, sections 8215, 8216, 8219, Revised Statutes 1909, have provided for the severance of the improvements from the land in certain cases where new improvements are made subsequent to the attachment of the mortgage lien on the land so as to give the mechanic's lien claimant a lien on the new building but where the property to which the mortgage lien originally attached is preserved. In the case of mortgages on chattels or chattels real, no provision is made for severing subsequent additions or improvements from the original and enforcing liens only against the betterments or to the extent of the enhanced value. This distinction is pointed out in *Schulenberg v. Hayden*, 146 Mo. 583. which case more clearly resembles this one in principle than the other above cited. In that case after the lien of a mortgage had attached to both the land and building, the building was largely destroyed by fire and rendered of little value. The mortgagor rebuilt and enlarged the former building, and the materialman who furnished materials used in rebuilding sought to enforce a mechanic's lien thereon. The court denied the right of the lien even on the rebuilt building, and pointed out that there was no statute giving a superior lien even to the extent of the enhanced value of the security and that mechanics' liens only take precedence of prior liens where the statute so provides. The court there states, page 596: "The conditions presented by the case at bar are not contemplated nor covered by either of those sections (sections 8215 and 8219, Revised Statutes 1909) and as the mechanic's

lien is a creature of the statute, and as the Legislature has not seen fit to make a law covering such conditions, the result is that the rights of the parties must be determined as of their contract rights. So measured, it follows that Silva had a right to give the mortgage to Bradford on both the land and the house. After the house was partially destroyed by fire, neither Silva nor Bradford were under any obligation to each other to restore or reconstruct it. Silva had a right to contract with Reader to reconstruct the house, but no act or contract between them could impair, affect or postpone the rights of Bradford. Reader was entitled to a lien against the equity of redemption of Silva, but when Silva's interest was cut out by the foreclosure of the mortgage, Reader's lien fell with it, for it had nothing left to rest on."

Nor do we think there is any question of estoppel in this case or ratification by the mortgagee of the contract between the mortgagor and the mechanic's lien claimant. Appellant's claim in this respect is based on the fact that the mortgage contains the recital that the concentrating mill mortgaged is to be "moved and rebuilt" at another location. A reading of the mortgage shows that this is a recital in the description of the mortgaged property in that the mortgage covered property then located on a certain tract of land in Jasper County was about to be moved and rebuilt on a certain tract in Newton County. This mortgage was to secure a part of the purchase price and it is evident that the purchaser, the mortgagor, was desirous of having the privilege of moving the property to this other location and that the mortgagee was consenting to this and identified this property in both its old and new location. Except for a clause in the mortgage prohibiting a removal of the mortgaged property on penalty of foreclosure, the mortgagor would have the right to move it at will and this clause was a waiver of the nonremoval clause to that extent. The mortgagor remained the owner of the property subject only to the payment of the mortgage debt, and had a right to improve, rebuild or remodel

same without the mortgagee's consent so long as he did not impair the security. As said in the *Schulenburg* case (*supra*), 146 Mo. 597: "As to cases like this where the mortgage covers the land and house both, and the house is partially destroyed by fire, the mortgagee is powerless to prevent the owner from reconstructing it, and he knows the lien cannot affect his mortgage, because the statute does not cover such a case, and therefore he has a right to rely upon the assumption that the contractor is doing the work of reconstruction on the credit of the equity of redemption and of the owner. The mortgagee is, therefore, under no obligation to the contractor to speak, and his silence cannot prejudice his rights."

The present case differs from *Dougherty-Moss Lumber Co. v. Churchill*, 114 Mo. App. 578, 90 S. W. 405; and *Hardware Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476; for in those cases the lessor and owner of the fee not only consented but obligated the lessee to make improvements for the lessor's benefit. The same distinction exists in *O'Leary v. Roe*, 45 Mo. App. 567, and in *Price v. Merritt*, 55 Mo. App. 640. Persons having nothing but liens on property whose ownership is in another should not be held to have subordinated such liens to subsequent incumbrances by such owner unless he has clearly so contracted.

The judgment of the trial court will be affirmed. *Farrington* and *Bradley, JJ.*, concur.

JOHN F. EDWARDS, Respondent, v. GEORGE W. COLLINS, Appellant.

Springfield Court of Appeals, December 20, 1917.

1. **TRIAL: Jury Question: Conflicting Evidence.** Where the evidence as to a question of fact is conflicting, the question is for the jury.
2. **LANDLORD AND TENANT: Covenants: Forfeiture.** Under the general law a breach by the lessee of covenants or stipulations in

a lease providing for payment of rent, or for use of the demised premises in a particular manner, does not, where the lease contains no forfeiture clause for a violation of the agreement, warrant the lessor in retaking possession on account of the lessee's breach, but merely gives the lessor a right of action for damages, such being the distinction between covenants and conditions.

3. ———: **Conditions: Breach: Landlord's Right to Recover.** Revised Statutes 1909, section 7880, provides that no tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another, without the written consent of the landlord, neither shall he violate any of the conditions of his written lease, nor commit waste upon the demised premises. The last clause was added to the section by amendment. Laws 1885, p. 187, section 7881 declares that if any tenant shall violate the provisions of the preceding section, the landlord, after giving ten days' notice to quit possession, shall have the right to re-enter the premises and take possession, or to oust the tenant, sub-tenant or under-tenant by proper procedure. A farm lease for five years required the land to be cultivated in the best manner possible. The lessee assigned the lease, and the lessor sought to recover possession on the ground that the assignee did not comply with the covenant relating to cultivation.

Held, that while these statutes change the general law in certain respects there could be no recovery by the lessor as the covenant contained no provision for forfeiture of the lease for a breach, as the statute did not apply to the lease, it not being a tenancy at will, or, by sufferance, and the term being for more than two years.

4. ———: **Breach of Covenant: Remedy of Landlord.** While Revised Statutes, section 7904, provides special and exclusive procedure for enforcing the collection of delinquent rent, a lessor seeking to recover possession of demised premises on account of the lessee's breach of covenant as to cultivation may, under section 7881, authorizing the lessor to oust his tenant by proper procedure, maintain ejectment.
5. ———: **Leases: Assignment: Consent of Landlord.** Under Revised Statutes 1909, section 7880, declaring that no tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest or any part thereof, without the written consent of the landlord, a tenant whose term was for five years may assign the same without the landlord's consent.
6. **APPEAL AND ERROR: Review: Harmless Error: Instruction.** Where the landlord admitted that he wrote the assignment himself, instructions predicating the assignee's right to possession on a finding that the landlord had knowledge of the assignment was harmless, though erroneous, since under the statute the assignment was good without the knowledge or consent of the landlord.

Appeal from Ozark Circuit Court.—*Hon. John T. Moore*, Judge.

REVERSED AND REMANDED (*with directions*).

W. D. Roberts, Green & Green and *Sebree & Orr* for appellant.

Boone & Luna, Watson & Page and *H. E. Howell* for respondent.

STURGIS, P. J.—This is a suit in ejectment by the the landowner to obtain possession of a farm in Ozark County. The defendant had possession of this land as tenant and assignee of a lease on same, the lease being for five years with some two years yet to run. The defendant justified his possession under this lease and in his answer states that under the assignment of the same this defendant was given possession of said land upon the full knowledge and acquiescence of the plaintiff and that defendant has complied with and performed all the conditions of said lease under and by all of which defendant claims possession and is in possession of said land.

The lease in question contains among others a provision that the tenant “agrees to cultivate said land in the best manner possible and to turn over and deliver to” the landlord one-third of certain specified crops to be raised on the land.

The evidence taken in the case all related to the question of defendant’s compliance with the condition of the lease requiring the land to be “cultivated in the best manner possible,” the evidence of the witnesses being directed, however, to defendant’s manner of cultivating the land, the amount produced thereon in comparison with similar lands in that neighborhood and this same land in similar crop years, and whether this land was “properly cultivated as a farmer should cultivate a piece of land.” The evidence adduced by the parties on this point was conflicting,

making it a question for the jury. The instructions given by the court are to the general effect that if the jury found that defendant did not cultivate the land in question in the best manner possible as a farmer should, to find for plaintiff, but if the defendant had complied with the conditions of his lease, to find for defendant. The jury found for plaintiff, judgment was entered accordingly and the defendant appealed.

The lease in question, containing the requirement of good cultivation of the leased land, contains no forfeiture clause for a violation of same and the defendant takes the position that this clause is a mere covenant, the violation of which may make the tenant liable to respond in damages, but does not subject him to forfeiture of his estate and possession. Such is the distinction between a covenant and a condition. [8 R. C. L., page 1100, sec. 158.] The general rule is that clauses in a lease providing for payment of rent in a specified time or manner, for the use of the demised premises for a particular purpose only, for land to be cultivated in a designated manner and the like, are, in the absence of a forfeiture clause, mere covenants and the violation thereof affords no ground for forfeiture. This principle of law is well expressed in 16 R. C. L., p. 1115, sec. 633, thus: "It is the general rule that the breach by the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term in the absence of an express proviso to that effect in the lease, the lessor's remedy being by way of a claim for damages; and this includes in case of a lease of farming lands a breach of the covenant to work or cultivate the land in a husbandlike manner." [See, also, 24 Cyc. 1349 and 1392; Mullaney v. McReynolds, 170 Mo. App. 406, 415, 155 S. W. 485; Tarlotting v. Bokern, 95 Mo. 541, 8 S. W. 547.]

Since there is no clause in the present lease declaring or permitting a forfeiture of the lessee's rights and possession for failure to comply with the provision of the lease as to good cultivation of the land, we would

hold that plaintiff is not entitled to recover on the proof made, were it not that this general rule of law has been changed by statute in this State. Section 7880, Revised Statutes 1909, reads: "No tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another without the written consent of the landlord; *neither shall he violate any of the conditions of his written lease, nor commit waste upon the leased premises.*" Section 7881 provides: "If any tenant shall violate the provisions of the preceding section, the landlord, or person holding under him, after giving ten days' notice to quit possession shall have a right to re-enter the premises and take possession thereof, or to oust the tenant, sub-tenant or undertenant by the proper procedure." The clause of section 7880, *supra*, printed in italics was added to that section by amendment (Laws 1885, p. 197) and the evident purpose thereof was to change the rule of law above announced and to make the violation of the terms of a written lease a cause of forfeiture to be enforced by an appropriate action. Section 7881, *supra*, provides that ten days' notice to quit possession is necessary before beginning proceedings to oust the tenant and the court in this case, by instruction number three, properly required proof of such ten days' notice. The only case which we find in any way construing the amendment to the statutes just mentioned is that of *Murphy v. Building Co.*, 90 Mo. App. 621, 624, in which case the court, in speaking of evicting a tenant for violating the terms of his lease, said: "No doubt a forfeiture of a lease may be worked by a tenant violating its terms, and he may be rightly evicted therefor. But it does not follow that the landlord may constitute himself the judge and jury, decide that the contract has been broken, declare a forfeiture and summarily eject the tenant without notice or a hearing. Due process of law must be followed in this, as in greater matters, and the law on the subject is plain." The court then quotes section 7880 and 7881 and adds: "Respondent says he never saw the printed

rule in question, but would have seen it had it been conspicuously posted. Whether he did or not, it could certainly have had no more force if posted than if formally expressed in a lease between him and appellant, and in such case notice to vacate must have been given to respondent."

The cases of Long v. Rucker, 166 Mo. App. 572, 583, 149 S. W. 1051 and Tarlotting v. Bokern, 95 Mo. 541, 8 S. W. 547, decided since the amendment of the statute above mentioned, both hold that the mere nonpayment of rent when due will not support an *action in ejectment* in the absence of a forfeiture clause in the lease. Such holding, however, is not in conflict with our holding here since section 7881, *supra*, provides that in case the tenant violates the terms of his written lease the landlord may oust him "by the proper procedure" and our statutes, section 7904 et seq., have provided a special procedure for enforcing the collection of delinquent rent. And so it is said in the Tarlotting case, *supra*: "In ejectment plaintiff cannot recover without showing that at the time his suit was commenced he was entitled to the possession of the premises sued for. The fact that rent is due, has been demanded and is unpaid, does not extinguish the relation of landlord and tenant, determine the tenant's term, or give the landlord a right of entry; the only right these facts confer upon the landlord is to institute a summary proceeding before a justice of the peace against the tenant, requiring him to show cause why possession of the property should not be restored to plaintiff. [R. S. 1909, secs. 3097, 3098.] If the tenant appears and shows that the rent has been paid, or on the hearing of the cause tenders the amount of the rent due and costs, that ends the proceeding, and the term of the tenant *continues*. If he does neither, then the justice may render judgment in favor of the landlord for the recovery of the premises, and that judgment *terminates* the tenancy. [R. S. 1909, secs. 3098, 3100.]" It is evident, however, that the remedy thus provided for the collection of delinquent rent is not available, much less exclusive, for ousting a tenant for

violation of the conditions of a written lease such as we are now considering. There is no rent due and unpaid as a foundation for that method of procedure. Ejectment seems to be a proper remedy. [Avery v. Railroad, 113 Mo. 561, 21 S. W. 90.]

Criticism is made of instructions five and six given by the court for predicating defendant's right to hold possession on a finding that plaintiff had knowledge of the assignment of the lease to defendant and acquiesced therein. It is true that this lease being for a term of five years could be assigned without plaintiff's consent. [Sec. 7880, R. S. 1909.] But there was really no dispute on this point. Plaintiff admitted that he wrote the assignment himself. We do not believe, therefore, that the jury was in any way misled or that the case should be reversed and a new trial required merely because the court submitted to the jury an immaterial question and one which could be found only one way. The defendant, moreover, tendered this issue in his answer as being material and made proof of it and should not criticise the court too severely for doing the like by the instructions. There was only one disputed issue before the jury and that a simple one, whether defendant, as tenant, had complied with the lease as to good cultivation of the land. The jury found that he had not and such being the fact he had violated the terms of the written lease under which he occupied the land.

My associates concur in the foregoing opinion but are of the opinion that the last clause of section 7880, Revised Statutes 1909, printed in italics, *supra*, does not apply to this case as it applies only to leases for a term of two years or less. The first clause of such statute is clearly so limited and such is the natural reading of the second clause. Such reading leads, however, in the writer's opinion to rather absurd results in that such section and the following one provide a remedy of ouster against the short-term tenant for the commission of waste or the violation of the terms of the written lease, but leaves the landlord without such remedy against the

long-term tenant, the very case in which he needs such remedy, as, for instance, in case a tenant is insolvent and a judgment for damages is no remedy at all. The writer was inclined to hold that the pronoun "he" in such second clause should be read to mean any tenant rather than the short-term tenant mentioned in the first clause, but my associates hold that we should adhere to the plain reading of the statute and that such statute is not applicable to the present lease. They think that the statute should have covered all cases but that it does not and such correction is for the Legislature and not for the courts. The case will therefore be reversed and remanded with directions to enter judgment for the defendant. *Farrington and Bradley, JJ.*, concur.

JAMES BRIDGES, Respondent, v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Appellant.

Springfield Court of Appeals, December 20, 1917.

1. **MASTER AND SERVANT: Injuries to Servant: Actions: Evidence.** In an action by a railroad employee injured when, by reason of the tipping of a coal car, an end gate which he and others were unloading toppled over and broke his leg, evidence that it was customary to block such cars, which were made so as to tilt when going around curves, when unloading heavy objects therefrom, was admissible as tending to establish the master's negligence.
2. ———: **Actions: Evidence: Admissibility.** Although a master is not required to furnish an absolutely safe place, nor is he guilty of negligence because a safer method or appliance could have been used, evidence in such case that the blocking or bracing of the car would have made it impossible for it to rock or tilt, and thus absolutely safe, cannot be excluded on that ground.
3. ———: **Injuries to Servant: Negligence.** Recovery cannot be defeated by showing that the master was guilty of other negligence than that relied on, where the negligence relied on was the proximate cause of the injury.
4. ———: **Negligence: Prima-Facie Case.** The plaintiff makes a prima-facie case of negligence when he shows that the defendant omitted to use a reasonably sure means of lessening or preventing

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- a known danger and his case does not fall because some other means might have been but was not used by defendant to accomplish the same result.
5. **APPEAL AND ERROR: Review: Harmless Error.** In a servant's personal injury action where he alleged three grounds of negligence, the defendant master cannot object that the instructions given at his own request limited the servant's right of recovery to one ground only, it appearing that the one act of negligence submitted was the proximate cause of the injury, for the failure to submit the other grounds of negligence was at least harmless.
 6. **MASTER AND SERVANT: Injuries to Servant: Care.** Where plaintiff was transferred from his usual duties, and with others required to unload end gates from a coal car, he cannot, having been injured when an end gate toppled over by reason of the tilting of the car, be denied recovery on the ground that he failed to exercise sufficient precautions in that the bottom of the end gate, which was to be slid over the side of the car, might have been pulled further from the side so as to give it a greater angle; it appearing that the servant was working under the immediate direction of a foreman.
 7. **NEGLIGENCE: Comparative Negligence: Effect of Contributory Negligence.** Under Federal Employers' Liability Act, April 22, 1908, chapter 149, 35 Stat. 65 (U. S. Comp. St. 1916, secs. 8657-8665), contributory negligence is not an absolute defense.
 8. **MASTER AND SERVANT: Injuries to Servant: Changing Condition of Place of Work.** Where a servant engaged with others in unloading end gates from a car was injured when the gate fell by reason of the tipping of the car which was not blocked, recovery cannot be denied on the theory that the injury resulted from an accident arising in the progress of the work, and that the duty of blocking the car rested on the servants; it appearing that the car was of a type made to tilt when it went around curves.
 9. ———: ———: **Actions: Evidence.** In an action for injuries received by plaintiff when an end gate which he and other servants were unloading from a coal car fell, the questions whether the master could have anticipated the injury which resulted from its failure to block the car which was of a type that tilted, and whether it was guilty of negligence by reason of such failure, held for the jury.

Appeal from Jasper County Circuit Court.—*Hon. R. A. Pearson, Judge.*

AFFIRMED.

W. F. Evans and Mann, Todd & Mann for appellant.

Sizer and Gardner for respondent.

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STURGIS, P. J.— The plaintiff recovered judgment for five thousand dollars for personal injuries received by him while working for defendant at its railroad yards at Ft. Smith, Arkansas, and defendant has appealed. When injured plaintiff was assisting in unloading some endgates from a coal car, and one of such endgates fell against him breaking his leg near the ankle. These endgates were some eight or nine feet long, four or five feet wide and two inches or more thick. They weighed six to seven hundred pounds. We take it that the sides of the coal car were four or five feet high and the endgates which plaintiff was assisting to unload were placed on edge one against the other in a row or tier extending across the car. The coal car was standing east and west and the first of the endgates leaned against the north side of the car and the next one leaned against it so on. The endgates were being unloaded on the south side of the car and all in this row or tier were unloaded except three, the north one of which leaned against the north side of the car and the other stood at about the same angle against it and each other. At first there were three men unloading these endgates and after a number were unloaded plaintiff, whose usual business was that of a car repairer, was directed to go and assist because of the weight of the endgates and the difficulty of unloading same over the side of the coal car. Plaintiff says he had never done this kind of work before and followed the directions of the foreman having immediate charge. He was injured while unloading the first endgate after he began work. This endgate was unloaded by being first "walked over" to the south side of the car and leaned against it. Then all four men stooped down, took hold of the end or edge on the floor of the car and raising it up "heaved it over" by sliding it over the side of the car. The weight of the endgate prevented these men from picking it up and throwing it over. When the weight of the endgate and the men were thus on the south side of the car and the endgate released, that side of the car gave down or tilted. This

caused the outer endgate leaning against the north side of the car to overbalance and fall toward the south side striking plaintiff's leg and crushing it.

The cause of the rocking or tilting of the car was that the car is built in the manner of the front gears of a farm wagon with a bolster and kingbolt working on the axle or bumpers. The tilting was less than an inch at the base but was from four to six inches at the top of the car. These cars were purposely built so as to tilt in this manner for safety in going around curves.

The negligence charged by plaintiff, and on which alone the case went to the jury, is that defendant was negligent in ordering plaintiff to get on said car and unload said endgates without first properly blocking or bracing the car so as to prevent its tilting and make the place where plaintiff was required to work reasonably safe, and that on account of said failure to block said car, brace same and keep it from rocking, the place where plaintiff was ordered to work was not reasonably safe. Other allegations of negligence are that defendant failed to furnish a sufficient number of men to handle these endgates safely and failed to warn plaintiff of the dangers arising from the work, plaintiff being inexperienced therein.

Plaintiff proved by a number of witnesses that in unloading heavy materials from the side of a car built as this one was, it was customary or at least of frequent practice on defendant's railroad and other railroads to first block up the cars by driving blocks or wedges under the bolsters thereby making the car steady and thereby preventing the otherwise natural movement of rocking. This evidence was objected to, and error is assigned, on the ground that failure to conform to custom or usage is not proof of negligence and that the master is allowed to conduct his business in his own way within the limits of reasonable safety. This court had occasion to say in *Cody v. Lusk*, 187 Mo. App. 327, 171 S. W. 624, that the mere fact of doing certain work in a way different from the customary way does not raise an inference of negligence just as the use of a

new kind of tool or device would not alone show negligence. In that case we were discussing whether negligence could be inferred from the mere fact of placing a large boiler on end instead of on its side (the customary way) in repairing it, when the only difference was to cause the workmen to work on a higher level—eleven feet high instead of seven. We were not passing on the admissibility of evidence, but, after all the evidence was in, including that of its being customary to place the boiler on its side instead of standing it on end, and it being apparent that the height had nothing to do with causing the accident, we held that mere lack of conformity to custom, nothing else appearing, did not show negligence. The point here, however, is entirely different. It was shown that these cars were built, and properly so, in such manner as to allow them to tilt when heavy pressure was put on one side rather than to be built perfectly rigid. No fault is being found with their being so constructed. This method, however, gave rise to certain dangers in doing certain work on these cars and the real question is whether the defendant was called upon to take and did take reasonable precautions to obviate or minimize this danger. It is not a question of defendant doing its work in its own way or in a way different from custom, but whether the due care which the master owes the servant did not require the master to take reasonable precautions to make the doing of the master's work in the manner selected by the master reasonably safe. The evidence objected to tended to prove that the danger to workmen arising from the rocking motion of this car in unloading this heavy material over its side could be readily and easily remedied by placing a block under the bolster and also that such dangers were so obvious and of frequent occurrence that defendant railroad had frequently taken cognizance thereof and adopted this very means of preventing such cars' from tilting or rocking. In *Marquis v. Kock*, 176 Mo. App. 143, 153, 161 S. W. 648, this idea is expressed thus: "For the jury to determine whether the defendants

could reasonably have foreseen the dangers and reasonably have adopted rules that would have prevented the injuries complained of, they had a right to determine that fact by taking into consideration what was usually and ordinarily done by those engaged in the same line of business." [See, also, *Schiller v. Breweries Co.*, 156 Mo. App. 569, 577, 137 S. W. 607.] Certainly plaintiff should be allowed to show, in order to establish a lack of ordinary care, that defendant omitted to do what its own methods of doing this kind of work had shown was both necessary and effectual in minimizing the danger.

It is also said to be error to allow plaintiff to show that the blocking or bracing of this car would have made it impossible for it to rock or tilt—that is, absolutely safe from danger. The reason assigned is that the master is not required to furnish an absolutely safe place nor is the master convicted of negligence be merely showing that a safer method or appliance might be used. Followed to its legitimate conclusion this means that the injured man must never prove that by taking a certain reasonable precaution the master may completely overcome a certain danger but must confine himself to those remedies which if used will still leave some danger. One would naturally think that if there be some cheap, accessible and easily applied remedy which obviates *all* danger from a certain source, that is the one the master should use for it is the one a reasonably prudent person would use. So, too, if there is a cheap, accessible and easily applied device which certainly and materially makes the place safer, such fact is receivable in evidence because the jury may then say that a reasonably prudent man would not neglect to use same. The difficulty with defendant's argument is in not distinguishing between the standard of due care, which is part of the substantive law and which marks the line between reasonable care and negligence, and the rules governing the admissibility of evidence bearing on such standard. [See 1 Wigmore on Evidence, sec. 461.] In *Hosheit*

v. Lusk, 190 Mo. App. 431, 445, 177 S. W. 712, this court said:

"Nor is it always improper to show that another method of construction or operation of an instrumentality in actual use is practical and avoids the dangers of the one in question as tending to show the one in question is not reasonably safe. 'The more logical as well as the more equitable rule would therefore seem to be this—that evidence tending to show that a safer instrumentality might have been used, has an appreciable bearing on the question whether the one actually used was reasonably safe, and may or may not be conclusive, according to the other elements presented in the case.'"

As before stated, while the plaintiff alleged three grounds of negligence, the instructions given limit his right of recovery to one ground only, to-wit: defendant's failure to block and brace the car so as to prevent same from rocking or tilting. Presumably this was done because the evidence did not show negligence either in failing to furnish a sufficient number of men or in failing to warn plaintiff of the dangers. The defendant asked the court to so instruct the jury. It is somewhat novel to assign error on this ground because if the evidence does not support these other grounds of negligence it was certainly not error to omit them, and if the evidence does show negligence in these respects then the error is in defendant's favor. If one act of negligence is relied on and proven it certainly does not defeat the action to show that another act of negligence not relied on contributed to produce the injury. It is only where the act of negligence relied on is shown not to be a proximate cause of the injury, but that a different act was the proximate cause, that the case must fail. [Mullery v. Telephone Co., 180 Mo. App. 128, 168 S. W. 213.]

In this case there is little doubt that the cause of plaintiff's injury was the natural rocking or tilting of the car caused by unloading a heavy body from one side. That is what tipped over the endgate which

fell on plaintiff. The only question here is whether the defendant, charged with the duty to take reasonable care not to injure its workmen, should have taken some reasonable means to overcome such danger. The three acts of negligence alleged all relate to some means of prevention. The one means of prevention which the evidence shows could readily have been used and which would have been effective was to block up or brace the car. It was proven that this was not done. The defendant was left free, however, to exonerate itself of negligence by showing that it did something else which made blocking or bracing the car unnecessary or at least made plaintiff's work reasonably safe. Defendant might, as suggested, have furnished an extra man to prevent the endgates from falling over when the car tilted, but defendant did not do so. The defendant might (though we do not so decide) have warned plaintiff of the danger and cast on him the duty of guarding himself against the danger. The defendant did not do this. To show that plaintiff's work was not reasonably safe it was proper for him to point out a reasonable safe means omitted by defendant by which the danger could be lessened or prevented and predicate negligence thereon. Having done this we have yet to find the case which holds that, because the evidence shows that some other means might have been, but was not, used by defendant to accomplish the same end, plaintiff cannot recover.

The facts in this case do not bring it within the rule that where the injury may have resulted from one of two causes for only one of which the master is liable, then the evidence must show with reasonable certainty that the cause for which the master is liable produced the result charged. [Smart v. Kansas City, 91 Mo. App. 586 and Warner v. St. L. & M. Ry. Co., 178 Mo. 125, 134, 77 S. W. 67.] As before stated there is no doubt but that the injury was caused by the rocking of the car and the consequent overturning of the endgate and the negligence is in not taking any proper steps to prevent this. We hold that in such case it is suffi-

cient for the plaintiff to point out an easy, practical and efficient method of so doing, especially when such method is the obvious and common method, and predicate negligence on the failure to use such means and then leave it to defendant to show if he can that he did use other means which were reasonably adequate to accomplish the result of making the work or place reasonably safe.

It is also argued that the overturning of the end-gate might have been prevented by pulling the bottom further out so as to give it a greater lean on angle and that plaintiff and his fellow workmen should have been alert for their own safety and looked after this. No such duty was imposed on plaintiff as he was working under the immediate direction of the foreman. It is true that many things requiring the use of judgment may be left to the judgment of the workman. But we cannot say that such was done here. Plaintiff was not accustomed to or skilled in this kind of work and was called there to assist those already working under the foreman. To say that plaintiff should have studied the situation and investigated the possible sources of danger and the means of overcoming same would have imposed on him the duties of the foreman. It is not even shown that he knew the construction of this car or its liability to tilt from weight thrown on one side when unloading heavy objects; nor did plaintiff know that the car had not been blocked or braced or some other means taken to prevent its tilting. This case is radically different from *Bradley v. Tea and Coffee Co.*, 213 Mo. 320, 331, 111 S. W. 919, and is more like *Corby v. Telephone Co.*, 231 Mo. 417, 132 S. W. 712. Moreover, this is a matter tending to show contributory negligence which is not pleaded and is not an absolute defense under the Federal Employee's Liability Act governing this case. Defendant did not seek either by its pleadings or instructions to mitigate the damages by reason of plaintiff's contributory negligence.

Nor do we agree that this was a danger arising in the progress of the work from the alterations in the condi-

tions in the work made by the workmen themselves. The blocking or bracing the car was a precaution which should have been taken before the work was commenced.

The point which has given us most concern is whether the rule of reasonable care to prevent injury required defendant to anticipate that the unloading of these endgates would be likely to cause this car to tilt as it did, and if so that such tilting would be likely to overturn the endgate. There is no difficulty in saying that if such result was likely to happen then some injury to some workman was likely to follow. The law on this subject was fairly and well stated to the jury in the instructions given to the effect that the jury must find that the car was not reasonably safe without taking such preventive steps to keep it from rocking and that a person using ordinary care would have done so; that defendant was not an insurer of plaintiff's safety in doing his work, but was only required to use reasonable care in making the car a reasonably safe place to work; that defendant was not required to guard against all possible accidents, but only such as a reasonably prudent person under like conditions would have reasonable grounds to apprehend might happen; that defendant was not required to prop or brace this car if it was already reasonably safe for unloading these gates; that the mere fact that bracing or propping the car would have prevented its rocking and the consequent injury does not show liability but the plaintiff must show that a person of ordinary prudence would have reason to anticipate that the space between the bolsters at the bottom of the car would allow it to rock sufficiently to result in some accident or injury to the employees unloading the tail gates from the car. The jury found the defendant negligent according to these rules and without going into further detail we are satisfied that the evidence was such as properly takes this question to the jury.

We have not discussed all the defendant's subdivisions of his points and authorities but have given them attention and have discussed those which appeared

to us as having most merit. We have concluded that the judgment should be affirmed and it is so ordered. *Farrington and Bradley, JJ.*, concur.

R. F. BROWN, et al. (Plaintiffs), Respondents, v. H. K. MULFORD COMPANY, a Corporation (Defendant), Appellant.

Springfield Court of Appeals, December 20, 1917.

1. **DRUGGISTS: Negligence: Hog Cholera Serum: Liability.** Where defendant, a manufacturing chemist, sold to a veterinary hog cholera virus and serum for use on hogs, and he used it on plaintiff's hogs, which were thereby killed, the defendant was not an insurer of the remedy even if administered according to directions, especially where it specifically warned of the dangerous character of the substance.
2. ———: ———: ———: **Evidence.** Evidence held to show that the manufacturer of hog cholera serum and virus was not negligent in failing to divulge to the purchaser the dangerous and poisonous character of the remedy.
3. ———: ———: ———. The mere fact that hogs died from the use of hog cholera virus and serum in the way it was intended to be used does not establish negligence in its manufacture.
4. **NEGLIGENCE: Burden of Proof: Proximate Cause: Other Causes. Equally Probable.** The burden of showing a causal connection between the negligence and the injury is on plaintiff, and where the injury may have resulted from another equally probable cause and the uncertainty so inheres in the evidence as a whole, when received in the light most favorable to plaintiff after resolving all conflicts in his favor, that it is mere speculation to attribute the injury to the cause tainted with negligence, the plaintiff cannot recover.
5. **DRUGGISTS: Liability for Articles Manufactured and Sold.** A manufacturer or dealer is liable for injury to third persons using articles manufactured or sold by them only when sold as being safe and harmless and negligence is shown in the preparation or directions for using same.

Appeal from Christian County Circuit Court.—*Hon. Fred Stewart*, Judge.

REVERSED.

Barrett & Moore for appellant.

F. T. Stockard and Hamlin, Collins & Hamlin for respondent.

STURGIS, P. J.—The plaintiff, a farmer and stock raiser, sued and recovered judgment against the defendant, a manufacturing chemist, for causing the death of forty-nine of his hogs. The defendant is located at Philadelphia with branches or distributing offices at St. Louis, Kansas City and other large centers. It manufactures a large variety of chemical products and among them a remedy for hog cholera designated as the "Serum-Virus (Simultaneous or Double) Treatment." The defendant does a wholesale business only and sells this product to the Drug and Veterinary trade. The plaintiff claims that his hogs were killed by having this remedy administered to them. The medicine was sold to and administered by Dr. Winters, a local veterinary, though not licensed as such. The sale was made to Dr. Winters by a traveling salesman who took his order therefor and forwarded same to defendant.

It is alleged and admitted that defendant recommended this medicine as a remedy, or preventive rather, of hog cholera and prescribed the dosage and manner of administering same. The recommendation and prescription for its use is a general one being printed on the label of the bottles containing same and in circulars sent out with each bottle. The petition alleges that this hog cholera remedy was sold to Dr. Winters for use on the particular hogs of plaintiff with directions prescribed for administering it to such hogs, but the only evidence on this point is that Dr. Winters was practicing his profession, including that of vaccinating hogs for the cholera in that neighborhood, to the knowledge of the traveling salesman who took the order and that such traveling salesman knew of plaintiff's hogs and recommended to him the use of this remedy. Hog cholera was then prevalent in that neighborhood. It is not claimed that any such information accompanied the order and defendant received

and filled the order in the general way of goods sold to a local dealer. Dr. Winters testified that he had no connection whatever with the defendant company; that he ordered this medicine to use in vaccinating plaintiff's or any hogs in his field of practice; that he sent in a number of orders for this remedy during the year from time to time, some of which were filled at the Philadelphia office and some at the Kansas City office; that he thinks he vaccinated as many as six thousand hogs that season. All the directions he had for using this medicine were the general directions accompanying each bottle. The plaintiff admits that he employed and paid Dr. Winters to administer this remedy to his hogs, Dr. Winters furnishing the medicine, though the defendant's traveling man was present, recommended the medicine and heard plaintiff talking over the terms, etc. This salesman was merely the general salesman of defendant's products of which the serum was one and was merely calling on the trade and taking orders for this and hundreds of other products sold by defendant.

The plaintiff also alleges in his petition that the said hog cholera remedy used in the manner prescribed by Dr. Winters was a deadly poison and was so known to the defendant; that defendant knew that said remedy or serum would, if administered as per directions furnished by defendant, poison and kill hogs instead of curing and preventing the disease of cholera, which fact of the highly dangerous and poisonous character of the serum the defendant negligently failed to divulge or make known to Dr. Winters or to plaintiff. The proof falls far short of sustaining this allegation. The only proof of the remedy being a deadly poison is that Dr. Winters administered the same to these hogs and in eight days thereafter they became sick and began dying and at the end of two or three months forty-nine of the fifty-nine treated were dead. Both plaintiff and Dr. Winters say that at the time of the treatment the hogs were apparently well and showed no symptoms of cholera. The hogs of a neighbor were

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treated by Dr. Winters about the same time and a large per cent of them also died. It was shown, however, that hog cholera was raging in that neighborhood—that doubtless being the reason for these hogs being treated—and that other herds of hogs treated in the neighborhood fared well and showed a small death rate. It is conceded that hog cholera is highly infectious, spreading from farm to farm, the germs beings carried by dogs, birds and animals and even persons walking from an infected district may carry same on their feet. As to defendant not disclosing to Dr. Winters the dangerous character of this remedy, we may say that such is disclosed on the labels of the bottles and the directions for using same; and besides this Dr. Winters as a veterinary and holding himself out as competent to use this remedy in treating this disease must be held to have known the natural and probable results. Dr. Winters as a witness for plaintiff does not claim any ignorance or lack of information in this respect.

It should be explained, as we learn from the evidence, that this hog cholera remedy is considerably like vaccination for the prevention of smallpox. The simultaneous or double treatment consists of making two injections of different kinds of serum into the flesh of the hog at or about the same time. The one is a poison, the other an antidote. Both of these are taken from the blood of hogs, the one from a hog that has the cholera and the other from a hog that has had it and recovered—an immune hog. The only manufacturing about it is to condense and properly preserve this blood for use. The blood or virus from the cholera infected hog contains the cholera germs and is disease producing. The purpose of injecting this is to give the hog the cholera and unless something is done to cure it or counteract the effects, death will likely follow. The bottle containing this ingredient has on its label: "Hog Cholera Virus (Virulent Blood). Handle Carefully. Caution: Burn empty packages and unused virus." After giving the dosage of various sized hogs

this follows: "This product should be used only by qualified veterinarians. We guarantee that this product is carefully prepared, but we assume no responsibility for results following its use. The pigs from which this virus or virulent blood was obtained showed lesions of acute hog cholera only at post mortem. Virus should not be injected into hogs without full standard doses of Hog Cholera Serum Mulford, i. e., 20 c. c. for every fifty pounds of hog. If used without serum or with insufficient serum, it will produce hog cholera.

Hog Cholera Virus should only be administered in strict accordance with our printed instructions. Under no circumstances do we accept any responsibility, expressed or implied, as to the results of its use or sale. If the purchaser does not accept Hog Cholera Virus on the above terms it should be returned to us within five days." The serum which is given as part of the treatment is to cure or counteract the cholera virus. It is taken from the blood of hogs that have had the cholera and have become immune or hyper-immune from being infected a second or third time. This serum to be effective as an antidote must be injected before the hog has had time to become thoroughly infected with the virus and in practice is injected at the same time as the virus. The dosage of this is also given on the label and in the instructions for using this treatment we find: "Hog Cholera Virus Mulford should never be injected into hogs without the full standard dose of Hog Cholera Serum Mulford—i. e., 20 c. c. for every fifty pounds of hog. If used without serum, or with insufficient or weak serum, it will produce hog cholera. . . . It is only with the greatest care and best judgment on the part of skilled and qualified veterinarians that the Serum Virus or simultaneous treatment may be safely used. . . . If the dose of serum is too small in proportion to the dose of virus, or serum weak in potency is used, or the animals are unusually susceptible, hog cholera may ensue and a new center of infection be started. This disadvantage of the Serum-Virus method must be con-

sidered seriously. . . . Note—We guarantee Hog Cholera Serum Mulford and Hog Cholera Virus Mulford to be accurately prepared and carefully tested in accordance with approved scientific methods. We assume no responsibility for unfavorable results following its administration.”

Dr. Winters, testifying for plaintiff, says that in giving this treatment on plaintiff's hogs he followed the directions as to dosage and manner of injecting given by the defendant; that he does not know what caused the hogs to die; that other hogs vaccinated by him did well, the loss being practically nothing; that he don't remember how much he gave these hogs, only that he followed the directions on the bottle. Further testifying on cross-examination he said: “I read the notice on the box and on the bottle. I had full knowledge of the character and the results of the medicine that anyone would likely have, I knew that the notices told me that it would give the hogs the cholera. I knew that before I read it. Mr. Brown (plaintiff) was told the same thing before I gave the treatment to his hogs. He was told it would give his hogs the cholera. The prescription given with this medicine, judging from my experience and everything considered, is the proper prescription for a treatment of this kind. It is indeed. The way it is prescribed is the proper way to give it. It was properly described. This is the most approved and best medicine in treating hogs for the cholera and for the prevention of cholera—it is absolutely the only one recommended. . . . I vaccinated these hogs in every particular as described and recommended by the defendant. That method is the proper and correct method of doing it. From my standpoint as a professional man, there was no objection found to the directions they gave me. . . . A hog could have contracted hog cholera, and you wouldn't be able to recognize the fact with a thermometer test. If the hogs had contracted the cholera I could not have told short of six days by a test. It is possible these hogs could have

had the cholera at the time I vaccinated, and I would not have known it."

It is further shown that defendant is one of the largest and most reputable concerns of its kind; that this hog cholera remedy is not a secret or patented remedy but is prepared by a number of firms and its manufacture is open to all; that its preparation is regulated and supervised by the Agricultural Department of the United States Government and by most of the States (See Sec. 8785, U. S. Compiled Statutes 1916); that the defendant is and was duly licensed and supervised; that its methods of preparing virus and serum, the prescription and directions for its use, the dosage and all printed matter on and enclosed with the packages containing the virus and serum have the approval of the Agricultural Department of the United States.

In this state of facts the case was submitted to the jury without instructions outlining any theory on which defendant would be liable except an instruction telling the jury that if they found for the plaintiff to assess his damages at the market value of the hogs lost by plaintiff, "if you find from the evidence that plaintiff lost any hogs on account of the medicine mentioned in evidence being poisonous, and further find that said medicine or remedy was administered as per the directions of the defendant."

This instruction plainly implies that the jury need find but two facts to make defendant liable: (1) that the medicine was poisonous, and (2) that it was administered according to the printed directions. That it is more or less poisonous i. e., disease producing, is conceded, and this was known to both Dr. Winters and plaintiff. The effect of this instruction, therefore, is to make defendant an insurer of this remedy if administered according to the directions. Certainly this is not the law and it does not support a case based on negligence. The negligence alleged in the petition, that defendant negligently failed to divulge or make known to Dr. Winters or plaintiff the dangerous and

poisonous character of this remedy, is completely refuted by the evidence. Nor is there any negligence shown in the preparation of the particular virus used on plaintiff's hogs. The plaintiff's evidence is entirely silent on that point, while defendant's evidence is that all of it was prepared in the most careful and approved method.

The sole fact on which negligence on the part of the defendant is predicated is that the hogs all took sick with the symptoms of hog cholera and so many of them died. That all of them would be more or less affected by being vaccinated with this remedy and that some would die therefrom, was to be expected. It is said that no scientist or chemist has yet been able to detect any difference in the composition of the virus and the serum, the poison and the antidote, the blood of a sick hog and the blood of one after it has recovered. Why one produces disease and death and the other arrests and cures, is largely speculation. Why some hogs apparently healthy and in the same herd and conditions are expected to die when the same treatment is given to all is a matter not explained and doubtless not known. Much, doubtless, depends on the vitality and physical condition of the individual hog and this is difficult or impossible to ascertain. It is pretty well established that in its incipient stages hog cholera cannot be detected and when it has advanced to the stage where the symptoms are discernable it is too late for most hogs to yield to the antidote or serum. This is true of the disease, whether resulting from the usual contagion or caused by the injection of the virus. We might conjecture, therefore, judging merely from results, that these hogs already had the disease in its incipient stages and the serum administered after the additional injection of virus could not counteract the disease; or, judging merely from results, we might conjecture that Dr. Winters, however honest in his belief that he administered that remedy properly, made some mistake, misadventure or miscalculation, as we

know that administering too much of the virus or too little of the serum would result as this did. These are mere conjectures, of course, but so too, is it a mere conjecture that there was some negligence in the preparation of the virus used. The mere fact that injury resulted from the use of this virus in the way it was intended to be used is not sufficient to prove negligence in its manufacture. There must be evidence from which the negligence counted on is fairly and reasonably inferable. It is not enough to show accident and injury, but "where all the acts connected with the accident fail to point to the negligence of the defendant as the proximate cause of the injury, but show a state of affairs from which an inference could as reasonably be drawn, that the accident was due to a cause or causes other than the negligent act of the defendant, the plaintiff cannot rely on the mere facts or circumstances, nor is the defendant called upon to explain the cause of the accident or purge itself of the inferential negligence." [McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872; Smith & Son v. Railroad, 177 Mo. App. 269, 164 S. W. 132; Rowden v. Daniell, 151 Mo. App. 27, 132 S. W. 23.] "If there is any other cause apparent to which the injury may be with equal fairness attributed, the inference of negligence cannot be drawn." Oil Co. v. Torpedo Co., 190 Penn. 350; Minneapolis General Electric Co. v. Cronon, 166 Federal, 657, in which it is said: "Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought on the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real one when there is no satisfactory foundation in the testimony for that conclusion; when the alleged injury may have been due to one or the other of the two causes, either one of which may have been the cause, there can be no recovery unless it is shown that between the two causes in question, it was the negligence of the defendant which caused the injury."

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This case is different from any we find in this State. It is not a case where a person calls for and supposes he is buying and using a harmless drug or remedy and is given a poisonous one, as in *Fisher v. Golladay*, 38 Mo. App. 531; *Kelly v. Ross*, 165 Mo. App. 475, 483, 148 S. W. 1000. It is in some respects more like *Fowler v. Randall*, 99 Mo. App. 407, 73 S. W. 931, in that the party buying and using the remedy knew its dangerous character.

We may concede that a manufacturer or dealer in any article like this will be held liable to one poisoned by an article sold as being harmless, though the person injured was not the purchaser but a third person, provided the injury was the direct and natural consequence of the manufacturer's or dealer's *negligence* in the preparation of the poisonous article. [*Darks v. Scudder-Gale Grocer Co.*, 146 Mo. App. 246, 130 S. W. 430.] That case, and most of those cited therein, deal with "articles intended to be taken into the *human* system" and the doctrine is said to rest on public policy for the preservation of life and health. We will grant without deciding that this doctrine extends to animals. The distinction between that case and this is that here there is no proof of negligence in the preparation of the article causing the damage.

We are confirmed in our view that plaintiff wholly failed to make a case by the able and learned opinion of the Supreme Court of Iowa in the recent case of *Hollingsworth v. Midwest Serum Co.*, 162 N. W. 620, a case involving the loss of hogs from this same remedy, manufactured, however, by another company. In that case the same high death rate resulted from administering this remedy in the dosage and manner prescribed to apparently healthy hogs. That case is really a stronger one than this in that the plaintiff produced some evidence, held by the court to be insufficient however, bearing directly on negligence in the preparation of the serum used. In that case the same high death rate occurred in some herds while in others a low death rate ensued from the same treatment.

Cholera was prevalent in the neighborhood and it was said that this as well as other possible diseases may have already been present. The court held the evidence to support the verdict and remarked:

“This testimony, such as it is, furnishes something of an illustration of the easy door which would be open for the recoupment of cholera losses if the liability of a producer of serum could be predicated upon the mere fact that the serum failed to save. The business is well hedged about by the safeguards of government, both State and National. Adventurers cannot engage in it. Only men of competent experience can obtain license therefor. The plants are subject to continual official inspection. The power of governmental departments over them is practically unlimited. It is greatly to the interest of the public that effort and experimentation go on. A great degree of success has been attained. Continual discovery is being made. Even though the remedies have only partial success they are well worth while. The conclusion arrived at renders it unnecessary for us to pass on many legal questions which are ably argued in the briefs. The case presented occupies quite a new field. It is not a case of mistake in compounding medicine; nor a mistake of delivering a dangerous article in lieu of a harmless one; nor does it involve bad faith or fraud in putting the article into the channels of sale. Both purchaser and seller knew that in the use of the article uncertainty of result to some degree was inevitable. It was the duty of the producer to follow the approved methods of production and of testing, as generally recognized by those versed in the subject. Under the undisputed testimony he could do no more for general use.”

The result is that the judgment is reversed. *Farrington* and *Bradley, JJ.*, concur.

C. E. PRITCHARD, Respondent, v. PEOPLES BANK
OF HOLCOMB, Appellant.

Springfield Court of Appeals, February 6, 1918.

1. **PAYMENT: Voluntary Payments: Recovery.** One who voluntarily pays money with full knowledge relative to the claim made cannot recover it back in the absence of fraud or duress, although the money paid was not actually due.
2. **EXECUTION: Sales: Effect.** A sheriff's deed to land sold on execution contains no warranty that the judgment debtor has any title to the land, and does not divest, or purport to divest, the title of any one save the judgment debtor.
3. **PAYMENT: Recovery: Duress.** The voluntary payment of an illegal demand cannot be recovered back, unless paid under the immediate necessity to preserve the owner's property or person, and ordinarily a threat of legal process is not duress; hence plaintiff, who, after rendition of judgment, acquired land from a judgment debtor, cannot, having bid in the land at execution sale, recover the amount paid under his bid on the theory that it was paid under duress, for the sheriff could not sell plaintiff's interest, but only the interest of the judgment debtor, and the sheriff's deed could only amount to a cloud on plaintiff's title and result in future litigation.

Appeal from Dunklin County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

REVERSED.

Ely, Pankey & Ely for appellant.

John T. McKay for respondent.

STURGIS, P. J.—This suit is to recover back an amount of money paid by plaintiff to the sheriff of Dunklin County as the purchase price of some land sold under execution. The defendant is the judgment creditor in the execution sale and the money paid by the plaintiff was turned over by the sheriff to defendant. From a judgment for plaintiff the defendant appeals.

There is little dispute as to the facts. The defendant obtained a judgment against one M. E. Bledsoe in a Justice of the Peace court and thereafter filed a transcript of the same in the circuit court from which the execution issued. At the time the judgment was rendered, the judgment defendant, M. E. Bledsoe, owned the land in question. At the time the transcript was filed in the circuit court and execution issued thereon said judgment defendant had made a deed conveying the land to this plaintiff, but such deed was not yet recorded. The sheriff levied the execution on the land as the property of M. E. Bledsoe, the judgment defendant, and proceeded to sell whatever interest such defendant had. The present plaintiff filed his deed for record before the sheriff's sale. At the sheriff's sale plaintiff here bid in said land and received a sheriff's deed for same notwithstanding he then and now claims that he already owned said land by prior purchase and deed from the judgment defendant.

Having paid to the sheriff the amount of his bid and the sheriff having paid same to defendant in satisfaction of the execution, plaintiff sues to recover back same as having been paid under duress. The plaintiff's argument is that, although the judgment defendant had no interest in this land and same belonged to plaintiff, yet, to prevent a sale and to keep a cloud from his title, he was compelled to buy and pay his bid at the sheriff's sale and the amount so paid was paid under duress and can be recovered. On the other hand the defendant contends that the money paid was a voluntary payment and hence cannot be recovered.

The general rule is that one who voluntarily pays money, with full knowledge of the facts relative to the claim made, cannot recover it back in the absence of fraud or duress, although the money paid was not actually due, was without sufficient consideration and was paid under protest. The voluntary payment of an illegal demand when the party paying knows it to be illegal affords no basis to recover back same unless paid under an immediate necessity to preserve one's

property or person. [22 Ency. Law (2 Ed.), 609; Claflin v. McDonough, 33 Mo. 412; Davis v. King, 28 N. Y. Supp. 1026, 1029.] There is no claim of fraud in this case nor do we think there was any duress such as affords a basis for an action to recover back money paid. The threat of legal process is not duress, nor is there any duress when further legal proceedings are necessary before the party is or could be deprived of his property, for in such case such party may make his defense and defeat the claim. [Claflin v. McDonough, 33 Mo. 412, 416; Robins v. Latham, 134 Mo. 466, 473, 36 S. W. 33; Buchanan v. Sahlein, 9 Mo. App. 552, 562; Wolfe v. Marshall, 52 Mo. 167, 171.] In the last cited case the court said:

“Generally a threat of legal process is not duress, for the party may plead and make proof and show that he is not liable. . . . The reason for the rule and its propriety are quite obvious, when applied to a case of payment upon a mere demand of money unaccompanied with any power or authority to enforce such demand, except by a suit of law. In such case if a party would resist such unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded it should precede payment.

. . . But where he can only be reached by a proceeding at law, he is bound to make his defense in the first instance and he cannot postpone the litigation by paying the demand and afterwards suing to recover it back.”

In the present case defendant was not armed with an execution against plaintiff's property, nor even with a judgment against him, but only with an execution against M. E. Bledsoe. The sheriff did not sell or threaten to sell any interest of plaintiff in this land but only the interest, if any, of said Bledsoe. In the sheriff's sale there was no warranty that Bledsoe had any title. [2 Freeman on Executions, sec. 313H; McNamee v. Cole, 134 Mo. App. 266, 274, 114 S. W. 40; Hensley v. Baker, 10 Mo. 157; Talley v. Schlatitz, 180 Mo. 231,

79 S. W. 162; Noland v. Barrett, 122 Mo. 181, 190, 26 S. W. 692.] The sale under the execution in question did not, therefore, divest or purport to divest plaintiff of any interest he had in this land. Nor did it in anywise disturb plaintiff's possession of same. It is only by some further and future litigation, such as a suit to determine title, or to set aside the deed from Bledsoe to plaintiff for fraud, that the execution purchaser could disturb, if at all, the plaintiff's title to this land. The most that plaintiff can claim is that such sale and deed thereunder would cast a cloud on plaintiff's title. We find no case holding that money voluntarily paid to prevent possible or even threatened future litigation can be recovered back for duress. In Islay v. Stewart, 20 N. C. 297, 299, the court said: "Considering the sale as an ordinary execution sale, there was no warranty of title, express or implied. The purchaser at such sale buys the *interest* of the defendant in execution, and cannot object, when the price is demanded, that the goods bought belonged to himself or to a third person." The purchaser under the execution sale, though purchasing only the interest of M. E. Bledsoe in the land, would have a right to attack in future litigation the conveyance from Bledsoe to this plaintiff as being in fraud of creditors or from failure to record the deed before the transcript judgment became a lien. It was doubtless to avoid such possible litigation that plaintiff became the purchaser. It is well settled that money paid to buy off threatened or even pending litigation is not paid under duress. [22 Ency. Law (2 Ed.), 615.] The judgment is therefore reversed. *Farrington and Bradley, JJ., concur.*

BANK OF MALDEN, Appellant, v. WAYNE HEADING COMPANY, a Corporation, et al., Respondents.

Springfield Court of Appeals, February 6, 1918.

1. **CHattel MORTGAGES: Recording: Place of Recording.** Under Revised Statutes 1909, section 2861, providing that no mortgage of personal property shall be valid against any person other than the parties thereto, unless possession is delivered and retained, or unless the mortgage be acknowledged or proved and recorded in the county in which the mortgagor resides, chattel mortgages not recorded in the county where the mortgagor resides are invalid as against other creditors, though recorded in another county where the mortgaged property is situated.
2. ———: ———: ———: **“Residence of Corporation.”** Revised Statutes 1909, section 3339, requires a corporation's articles of agreement to state the name of the city or town and county in which the corporation is to be located. Section 3340 requires such articles to be recorded in the office of the recorder of deeds of the county or city in which the corporation is to be located. Section 2975 requires the certificate of incorporation issued by the Secretary of State to be filed and recorded in the county in which the corporation is organized. Section 2861 requires chattel mortgages to be recorded in the county in which the mortgagor resides. *Held*, that within the meaning of this last section a corporation resides in the county designated in its articles of incorporation and certificate of incorporation and in which it has an office at which much of its business is transacted, though its manufacturing plant and business office in connection therewith are across the line in another county, and a chattel mortgage recorded in the county in which the manufacturing plant is located is ineffective and void as against an attaching creditor.
3. **APPEAL AND ERROR: Abstracts: Abridging Evidence.** Where the evidence was comparatively short and the material part of it was documentary, and, though the oral evidence might have been further condensed by putting more of it in narrative form, it covered only thirteen printed pages, there was a fair effort to comply with the rules as to abstracts.
4. ———: **Briefs: Numbering Points.** Appellant's failure to number the propositions of law stated in its brief under its points and authorities was not very material, where the court experienced no difficulty in understanding the facts or the propositions of law relied on for reversal.

Bank of Malden v. Wayne Heading Co.

Appeal from New Madrid County Circuit Court.—*Hon. Sterling H. McCarty, Judge.*

REVERSED.

Casper M. Edwards for appellant.

Morrell De Reign and *Albery De Reign* for respondents.

STURGIS, P. J.—This is an interplea engrafted on an attachment suit. The plaintiff sued on a note by attachment and caused certain personal property of the defendant corporation to be attached. The interpleaders claim this property or an interest in the same under a chattel mortgage executed in their favor by defendants. It is conceded that both parties are creditors of defendant. There was a close run for priority in time as the evidence shows that the attachment was levied and the property taken possession of by the officer at practically the same time the chattel mortgage was being executed.

Conceding, however, that the chattel mortgage has priority, the plaintiff claims that such mortgage is void because not filed for record in the proper county. A decision of this question in plaintiff's favor leaves the interpleaders without any title or claim to the property as against the attaching creditor, plaintiff, and is necessarily decisive of the whole case.

The facts are that defendant is a Missouri corporation. Its articles of incorporating, as required by section 3339, Revised Statutes 1909, designate the name of the city and county in which the corporation is to be located, as Malden, Dunklin County, Missouri. The articles of agreement were recorded, as required by the next section, 3340, in Dunklin County as being the county in which the corporation was located. The certificate of incorporation issued by the Secretary of State likewise designated "its permanent place of location" to be Malden in Dunklin County, and this was likewise recorded in Dunklin County as being

the county of its organization. [Sec. 2975, R. S. 1909.] The city of Malden is located wholly in Dunklin County, but near the New Madrid County line, and defendant's manufacturing plant and business office in connection therewith are in New Madrid County. It is shown, however, that defendant kept an office in Malden, Dunklin County, where the business meetings of the stockholders and directors were held, where the seal and corporate records were kept and much if not most of its corporate business was transacted. Two writs of attachment were issued, one to each of the sheriffs of New Madrid and Dunklin Counties, and each were served on defendant, the one at its business office in New Madrid County, and the other at its office in Malden, Dunklin County.

The chattel mortgage in question was recorded only in New Madrid County and the question presented is whether such mortgage is void under section 2861, Revised Statutes 1909. That section provides: "No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties hereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the *mortgagor or grantor resides*, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides." There is no claim that the mortgagee took possession of the mortgaged (and attached) property and the validity of the mortgage depends on its proper recordation.

Our courts have frequently and uniformly held that chattel mortgages not recorded in the county where the mortgagor or grantor resides are void as against other creditors. A chattel mortgage not

so recorded is fraudulent and void as to creditors although recorded in another county where the mortgaged property is situated. [Rice, Stix & Co. v. Sally, 176 Mo. 107, 133, 75 S. W. 398; Fahy v. Gordon, 133 Mo. 414, 34 S. W. 881; Ray County Savings Bank v. Holman, 63 Mo. App. 492, 495; Martin-Perin Mercantile Co. v. Perkins, 63 Mo. App. 310, 314; Bagley v. Harmon, 91 Mo. App. 22.] If, therefore, the residence of the defendant corporation was in Dunklin County, the recording of the mortgage in New Madrid County had no effect in making it valid.

What constitutes and determines the place of residence of a domestic corporation within the meaning of the chattel mortgage statutes as to recording seems not to have come before the courts of this State. Jones on Chattel Mortgages (5 Ed.), sec. 253, says: "The place of residence of a corporation for the purpose of recording a mortgage by it is the place where it keeps its principal office." The only case cited in support is Wright v. Bundy, 11 Ind. 398, an old case and one not very satisfactory on this point. 1 Clark and Marshall on Private Corporations says, section 122, that: "The general rule is that the residence or domicile of the corporation within the State is in that county, city or town, and that one only, in which it has its general or principal office and conducts its business." In Pelton v. Transportation Co., 37 Ohio St. 450, the court states the law thus: "In this State, where corporations are required to designate in their certificates of incorporation the place of the principal office, such office is the domicile or residence of the corporation. The principal office of a corporation, which constitutes its residence or domicile, is not to be determined by the amount of business transaction here or there, but by the place designated in the certificate." Almost this precise question came before the court in First National Bank v. Wilcox (Wash.), 130 Pac. 756, where the court held that under a statute similar to ours a chattel mortgage or conditional bill of sale of personal property, to be valid by reason of being recorded in the

county of the mortgagor's residence, must in case of a domestic corporation be recorded in the county specified in the articles of incorporation as the principal place of business and where it maintains its head office; and it is not sufficient to record it in another county where its manufacturing plant is located and where it mainly keeps and sells its manufactured products. In the course of the opinion the court said: "We are clear, therefore, that the place designated in the charter of local corporations as their principal office or place of business must be held to be the residence of such corporations." The proper place of recording a chattel mortgage came in controversy in *In re Federal Contracting Co.*, 212 Fed. 688, and the court said, pp. 692-3: "The Supreme Court of the United States said, in *Galveston, etc., Ry. Co. v. Gonzales*, 151 U. S. 504, 14 Sup. Ct. 401, 38 Law Ed. 248, that the question of inhabitancy of a corporation must be determined, not by the residence of any particular officer, but by the location of the principal offices—where its books are kept and its corporate business is transacted, even though it may transact its most important business elsewhere, citing *Conn., etc., R. R. Co. v. Cooper*, supra. . . . A statement in a certificate of incorporation as to the location of the corporation's principal place of business is conclusive on the corporation. [*People v. Barker*, 5 App. Div. 227, 39 N. Y. Supp. 88.]" This case came to the Supreme Court of the United States under the title of *Fairbanks Steam Shovel Co. v. Wills*, 60 L. Ed. 841, where the court pointed out that the articles of incorporation as required by statute of Illinois fixed the chief or home office at Chicago; that the first meeting of the stockholders was held at Chicago and another one some two years later; that all other meetings of stockholders were held at Beardstown, Illinois, where the business office was located; that an office was nominally maintained at Chicago but no records or books were kept there nor business transacted there; that as to the practical conduct of the business and to all outward appearances the principal office was

at Beardstown. The chattel mortgage was recorded there instead of at Chicago and the trial court held same void as not being recorded in the county of the corporate residence. The court said: "This, in our opinion, was a correct disposition of the question. The statutes of Illinois recognize the propriety of a fixed location for the principal office of a corporation, requiring this to be specified in the certificate of organization and to be left unchanged except on formal action by two-thirds in interest of the stockholders. . . . We are of opinion that a corporation organized under the laws of Illinois is to be deemed a resident of the State within the meaning of the chattel mortgage act, and that the county of its residence must be taken to be the county in which its principal office is located. So far as the decisions of the State courts throw light upon the question they bear out this view.

We hold therefore that the residence of the defendant corporation was in Dunklin County and that the failure to record the mortgage there made same void. The interpleader, therefore, cannot recover in this case. The court in the first instruction correctly declared the law to be "that a corporation is a legal entity and as such has capacity to sue and be sued and must have a habitat, that such legal habitat or domicile is fixed by its articles of incorporation or certificate of incorporation as recorded in the office of the Recorder of Deeds of the County in which it is organized." But in an instruction for interpleader the court said it was for the jury to say whether the defendant was a resident of Dunklin or New Madrid county. Under the facts here this was purely a question of law for the court and not one of fact for the jury.

We have not been unmindful of interpleader's motion and insistence that this appeal be dismissed for failure of plaintiff, appellant, to comply with our rules in preparing abstracts and briefs. The evidence in this case is comparatively short and the material part of it documentary. The oral evidence might have been further condensed by putting more of it in narrative

form. As it covers only thirteen printed pages, appellants, we think, have made a fair effort to comply with our rules as to abstracts. The brief under "Points and Authorities" states in concise paragraphs the propositions of law contended for with citations of authority under each. They are not numbered as is usual but that is not very material. We have experienced no difficulty in understanding the facts nor the propositions of law relied upon for reversal. The motion to dismiss is overruled and the judgment is reversed. *Farrington and Bradley, JJ.*, concur.

SUSIE KERR, Respondent, v. B. F. BUSH, Receiver
of the ST. LOUIS IRON MOUNTAIN &
SOUTHERN RAILWAY COMPANY, Appellant.

Springfield Court of Appeals, February 6, 1918.

1. **RAILROADS: Death at Crossing: Evidence.** Evidence held sufficient to support a finding that plaintiff's deceased husband was on a crossing and not on the right of way when struck by a train.
2. ———: **Crossings: Signals: Negligence: Burden of Proof: Contributory Negligence.** Failure of trainmen to give signals when approaching a crossing as required by Revised Statutes 1909, section 3140, is negligence *per se* which casts the burden on the railroad to show such failure was not the cause of injury. The ordinary rule that the burden is on plaintiff to show the causal connection is changed by statute in such cases.
3. ———: **Injuries at Crossing: Contributory Negligence: Question for Jury.** Contributory negligence is a defense in such cases and whether one killed on a railroad crossing where no statutory signals were given and the night was dark and rainy was guilty of contributory negligence in not seeing or hearing the train held, under the evidence, a question for the jury.
4. ———: **Deaths at Crossings: Signals: Statutes Applied.** The statutory requirement as to railroad trains giving signals on approaching public road crossings, inures only to the benefit of persons traveling on the public road and crossing or intending to cross the railroad track and Revised Statutes 1909, section 3140, requiring certain signals and throwing the burden on railroad to show that failure to give statutory signals was not the cause of

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injuries at the crossing, does not apply to one killed on the crossing who was walking down the track and not across the track.

5. ———: **Deaths at Crossings: Signals: Statutes Applied.** Revised Statutes 1909, section 3140, requiring certain signals and throwing the burden on railroad to show that failure to give statutory signals was not the cause of injuries at a crossing, does not apply to one killed on the crossing who was walking down the track and not across the track.
6. **APPEAL AND ERROR: Reversible Error: Instructions.** It was reversible error, where the principal instruction for plaintiff covering the whole case failed to state that signals required at railroad crossings by Revised Statutes 1909, section 3140, only applied to those walking along the highway, although the court gave such an instruction at defendant's request.

Appeal from Stone County Circuit Court.—*Hon. Fred Stewart, Judge.*

REVERSED AND REMANDED.

Barbour & McDavid, Rufe Scott and James F. Green for appellant.

G. W. Thornberry and Hamlin, Collins & Hamlin for respondent.

STURGIS, P. J.—The plaintiff, as widow of William Kerr, deceased, sues for damages under the wrongful death statute for the death of her husband caused by the alleged negligence of the defendant in operating as receiver the St. Louis, Iron Mountain & Southern Railroad. The deceased met his death on the night of March 1, 1916, at or near a public road crossing some three miles east of Galena, Stone County, Missouri, where his body was found about nine o'clock p. m. The railroad runs north and south through the town of Galena and just south of the town turns east, crosses James River, and runs east and then southeast to the town of Reeds Spring. The deceased was a farmer and lived adjoining the defendant's right of way on the south something more than a quarter of a mile east of the crossing where he met his death and was at

the time going from Galena to his home. The public road from Galena to Reeds Spring also passes deceased's home and follows the same general direction of the railroad, and, crossing it at right angles from the north side to the south side at Scobee Crossing, continues east past deceased's residence which is between the wagon road and the railroad and close to each.

The petition alleges that the deceased was returning home from Galena on the night of March first and in doing so was traveling the public road to the Scobee Crossing and while attempting to cross the railroad at such crossing was struck and killed by defendant's work train running west toward Galena. The sole ground of negligence alleged was that this train was run at a high and dangerous rate of speed across the public road without giving any statutory warning of ringing the bell or sounding the whistle. It is distinctly alleged that deceased was at all times traveling on the public highway and was crossing the railroad in so doing when he was struck and killed.

The answer is a general denial and pleads contributory negligence in that the deceased carelessly and without looking or listening went upon the railroad track in front of an approaching train and was thereby struck and killed. The reply denies the contributory negligence and says that the night was dark and the engine of defendant's train was running without a headlight or any light and was pushing a freight car in front of the engine; that no signal or warning was given and that owing to the conditions the deceased had no warning of the train's approach.

The defendant's theory, developed at the trial, is that the deceased approached this crossing traveling down the *railroad track* going home and that he was struck and killed while on or trying to cross the cattle guard at the side of the public road; or at least the evidence makes this as probable as the plaintiff's theory. The last time William Kerr was seen alive was at Galena, apparently starting home about five o'clock in the evening by going east on the public road. This

road, however, after crossing James River just east of town on a bridge further north than the railroad bridge, there divides, one road going north and east over the hills and returning to the railroad, the other going south and passing under the railroad river bridge and thence east on the south side of the railroad. There was a path leaving this southern branch near the railroad bridge by which pedestrians frequently went onto the railroad track and thence east along such track. No one knows which of the three roads (the north public road, the middle railroad or the south public road) the deceased traveled toward the fatal crossing, though the case proceeded upon the general assumption that it was either the north public road or the railroad. There was evidence that deceased had used both routes more or less frequently. This, however, is not very material, as all these roads, the two wagon roads and the railroad, again converge at what is called the Covey Crossing, a half mile or more west of and before reaching the Scobee Crossing where deceased was killed. From the Covey Crossing to the Scobee Crossing the public road and the railroad are nearly parallel and close together. The material point is to know whether the deceased traveled from the Covey Crossing to the Scobee Crossing along the public road or the railroad track, for that determines whether when killed he was crossing the railroad on the public road or was crossing the public road on the railroad.

That deceased was struck and killed at the crossing (however he approached it) as the jury found, we think amply supported by substantial evidence. His body was found by traveler on the railroad an hour or less after the train in question passed over this crossing. The trainmen, however, knew nothing of the accident. The deceased's body was found sixty feet or more west of the west cattle guard lying between the rails but the evidence all showed that it was dragged at least from such cattle guard. There is substantial evidence that there was blood and brains near the north rail at a point at least two or three feet east of the east side of

this cattle guard and therefore in the public highway, though some ten feet from the traveled wagon track. As the train was going west some fifteen to twenty miles per hour when it struck deceased, he could hardly, when struck, have been further west than the first blood spots and was likely struck and knocked some distance by the first impact and left these traces when he next touched the rail and ties. This is further shown by his cap being found just east of the cattle guard and in the highway at or near the same place as the blood and brains. Some lemons which the deceased carried were found under the cattle guard. If the deceased approached along the highway it is not unnatural in view of its muddy condition that he walked along the side of the traveled track rather than in it. This point is therefore settled by the jury's verdict.

It is also settled in the same way that defendant was negligent in failing to give any warning by bell or whistle in approaching this crossing. Several witnesses who were in a position to observe and know so testify and the evidence on this point cannot be called weak. This failure to give the statutory signal by bell or whistle in approaching a public road is negligence *per se*; and, with the finding that deceased was killed and plaintiff's damage was sustained at such crossing, the burden is cast on defendant to show that such negligence was not the cause of such injury. [Sec. 3140, R. S. 1909.] The rule is stated in McNulty v. Railroad, 203 Mo. 475, 477, 101 S. W. 1082, that: "The effect of the statute, section 1102, Revised Statutes 1899, adopted in 1881, has been to change the law in this respect, so as to make a prima-facie case by proof of the failure to ring the bell accompanied by an injury at the crossing. There need be no proof that the failure caused the injury. The law supplies that proof, and casts the burden upon the defendant to show that the failure to ring the bell was not the cause of the injury." It is the general rule in negligence cases that the plaintiff must show a causal connection between the negligent act and the injury or damage; but such is not

the law by reason of our statute in a case of negligence for failure to give statutory signals at road crossings. "Such would also be the rule as to failure to give the statutory signals, were it not that the effect of the statute (Section 3140, R. S. 1909) has been to change the law in this respect, so as to make a prima-facie case by proof of the failure to give the signals, accompanied by an injury at the crossing. There need be no proof that the failure to give the signals caused the injury. The law supplies that proof and casts the burden upon the defendant to show that the failure to ring the bell was not the cause of the injury." [Byars v. Railroad, 161 Mo. App. 692, 707, 141 S. W. 926; 2 Thompson on Negligence, sec. 1587; Huckshold v. Railroad, 90 Mo. 548, 2 S. W. 805.] In McGee v. Railroad, 214 Mo. 530, 544, 114 S. W. 33, the court quoted the statute and said: "Under that statute, plaintiffs were relieved from proof that the failure to ring the bell or sound the whistle was the proximate cause of the injury. *The statute supplies the causal connection.* In other words, given proof of a failure to comply with the law and that injury ensued at the crossing (as here), then the statute raises a presumption that the injury was the result of disobeying the statute—that they bore the relation of cause and effect—and the burden is cast upon the defendant to show that the failure to give the statutory signals did not cause the injury."

The above rule, however, does not relieve the plaintiff of the consequences of contributory negligence as a defense (Whitesides v. Railroad, 186 Mo. App. 608, 617, 172 S. W. 467); and the defendant discharges the burden cast upon him by the statute if it shows that the deceased was guilty of negligence contributing to and mingling with defendant's negligence in causing the injury. The evidence is that the railroad track at this point was straight and unobstructed; and that under normal conditions a train could be readily seen and heard for such a distance as to make the fact that deceased, with sight and hearing unimpaired, went in front of this train, speak negligence on his part, for it

was only a step from safety to danger and from danger to safety. It was to rebut this contributory negligence, and not as an original ground of negligence, that the plaintiff showed by substantial evidence that the night was very dark, stormy and surley; that the train was running down grade not working steam and without a headlight or any light; that it was March first and a rather strong March wind was blowing. It had recently been raining also, and a small mountain creek just beyond the right of way, with a sycamore tree, branches and all, felled across it for a foot log, was making considerable "roar"—so much so that one witness said he could not be heard across it in trying to talk to another witness on the other side. Under these facts and aided by the presumption of due care attending the deceased (*Crumpley v. Railroad*, 111 Mo. 152, 158, 19 S. W. 820) the deceased cannot be declared negligent as a matter of law in not seeing or hearing the approaching train.

The difficult question in the case is defendant's insistence that deceased, though injured at the crossing, was not within the protection of our statute relating to train signals at road crossings and injuries caused by failure to give same, unless it be shown that deceased was a traveler on the public highway crossing the railroad rather than a traveler on the railroad approaching or crossing the highway. The rule is stated in 2 Thompson on Negligence, sec. 1560, thus: "But it has been well reasoned that this omission is negligence as a matter of law only when injury results therefrom to persons or animals endeavoring or intending to cross the track upon a street or highway crossing; and this for the manifest reason that the object of the statute is to protect persons and animals in this situation, and not in other situations." In 3 Elliot on Railroads, sec. 1158, p. 333, the law is thus stated: "Where the statute does not specifically designate the class to whom the duty is owing, the courts have usually construed it to be due only to those who are about to use, are using or have lately used the crossing, and have held that no

others could recover for injuries resulting from a failure to give the signals," citing two Missouri cases, *Bell v. Hannibal, etc., Railroad*, 72 Mo. 50; *Evans v. Atlantic, etc., R. Co.*, 62 Mo. 49. In *Rohback v. The Pacific Railroad*, 43 Mo. 187, our statute was held not to apply to an employee of the railroad though working at and injured at the crossing of a public street and the railroad, the court observing that: "It is obvious that the enactment of the law was intended primarily for the protection of the traveling public and passengers." In *Evans v. Railroad*, 62 Mo. 49, 57, the court said: "The object of the statute is manifestly to protect persons passing on the road or highway," and not those at nearby private crossings. In that case the plaintiff was an employee crossing the railroad at a path near the public crossing. In *Bell v. Railroad*, 72 Mo. 50, the court said that: "The requirement of section 806 (now section 3140), Revised Statutes, that the Bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway." In *Burger v. Railroad*, 112 Mo. 238, 246, 20 S. W. 439, the court held that the statute "was intended to give warning of the approach of a train to persons who might be crossing, or intending to cross, the railroad over the public highway;" and did not apply to one going between cars blocking a public crossing. In *Degonia v. Railroad*, 224 Mo. 564, 592, 123 S. W. 807, the court said crossing signals are not for employees or persons "not crossing or intending to cross at a public crossing," but the case then in hand related to an injury to an employee at a place other than a public crossing. It was there pointed out that the statute was restricted to injuries sustained "at the crossing." *Ayers v. Railroad*, 190 Mo. 228, 237, 88 S. W. 608, holds that the statute does not apply to one injured at a private crossing, though near enough to a public crossing to be warned by a signal for it.

Wasson v. McCook, 80 Mo. App. 483, holds that the statute does not apply to one traveling on the highway but not about to cross and not injured at the crossing. The case of Whitesides v. Railroad, 186 Mo. App. 608, 617, 172 S. W. 467, is the only case directly in point on the facts, for there the deceased came to the crossing along the railroad track and the court said: "Besides the considerations which point the statutory obligation to give signals on approaching the crossing of a public highway as one inuring only in favor of those persons using the crossing in connection with the use of the highway, it is to be said that plaintiff's right, in so far as this argument is concerned, is to be denied on the grounds of contributory negligence."

There is much reason to limit the statute to those cases where the injury occurs *at the crossing*, for such is the statute, but to limit it further, by inquiring into the purpose for which he goes there and the route by which he came, narrows the statute and were this a new question we might hesitate to so hold, but such is the firmly established law. If, therefore, the deceased came from the Covey Crossing to the Scobee Crossing by walking the railroad track instead of the public road, he is not entitled to recover on the negligence alleged; but he is so entitled if he came by the public road.

Defendant insists that it is purely conjectural as to which way plaintiff traveled toward Scobee Crossing and invokes the well known rule that, where the injury may have occurred from either of two causes or in either of two ways for only one of which defendant is liable, it is incumbent upon plaintiff to produce substantial evidence that the injury was caused by the one for which defendant is responsible. [Goransson v. Riter-Conley Mfg. Co., 186 Mo. 300, 307, 85 S. W. 338; Warner v. Railroad, 178 Mo. 125, 133, 77 S. W. 67.] In this case there is evidence that the public road was the one most used by the deceased and especially in recent times since he had been warned of the danger of traveling on the railroad. In the absence of direct

evidence it may be that the presumption of using due care and not going into danger should be indulged in deceased's favor. Moreover, it was shown that another train going in the same direction as this one had passed over the same track and road crossing only about thirty minutes previous to the one which killed the deceased and that a son of deceased was then at the fatal crossing and afterwards walked down the track for a quarter of a mile and deceased was not then along the track.

The case is a close one on this point and demands that the jury be clearly and correctly instructed as to the facts which render defendant liable. The leading instruction in the case, and the only one for the plaintiff, except as to the measure of damages, is this:

"The court instructs the jury that under the law of Missouri a bell is required to be placed on each locomotive engine used by railroad companies in this State, and it is made the duty of the railroad company or its agent in charge of said locomotive engine and running same over any traveled public road to cause said bell to be rung at a distance of at least eighty rods from the place where the railroad shall cross a traveled public road, and in this case, if you believe that defendant ran a locomotive engine and train of cars over a traveled public road in Stone County at a point between the town of Reeds Spring and Galena, in said county, and such engine and train struck and killed William Kerr in the crossing of a traveled public road and said railroad, and if you believe the defendant failed to ring the bell as aforesaid, and that such failure was the direct cause of William Kerr being struck and killed on said crossing, then if you believe plaintiff was the wife of said William Kerr, you will find the issues in this case for her, unless you believe from the evidence in this case that defendant sounded the steam whistle on said engine at intervals for a space of eighty rods before reaching said crossing, and (or) unless you further believe that said William Kerr was guilty of negligence, which contributed to his

death; and you are instructed that contributory negligence on the part of said William Kerr must be established by the greater weight of all the evidence in this case, and unless it is so established you cannot find for defendant on that ground."

This instruction is clearly erroneous in ignoring the question of how the deceased approached the crossing, whether along the public road or along the railroad. Its only requirement in that respect is that he was struck and killed on the crossing of the public road and that the failure to ring the bell (in the absence of sounding the whistle) was the cause of his being struck and killed on the crossing. This instruction covers the whole case and directs a finding on the conditions named and does not require a finding that deceased was traveling *on the highway* in attempting to cross the railroad. That the principal instruction should not omit so vital a matter needs no citation of authorities and it does not correct the error to give an instruction for defendant supplying such omission. The rule is that when plaintiff's principal instruction purports to cover the whole case and directs a verdict for plaintiff on a finding of the facts there required and omits to require the finding of a fact essential to sustain the verdict such error is not cured by the giving of another instruction either for defendant or plaintiff supplying the deficiency. Such instructions are held to be inconsistent in that one authorizes a verdict without finding such essential fact though the other requires it. [Traylor v. White, 185 Mo. App. 325, 331, 170 S. W. 412; Ghio v. Merchantile Co., 180 Mo. App. 686, 700-1, 163 S. W. 551; Hall v. Coal and Coke Co., 260 Mo. 351, 369, 168 S. W. 927; Wojtylak v. Kansas and Texas Coal Co., 188 Mo. 260, 283, 87 S. W. 506; Walker v. White, 192 Mo. App. 13, 18, 178 S. W. 254; Humphreys v. Railroad, 191 Mo. App. 710, 721, 178 S. W. 233; Wilks v. Railroad, 159 Mo. App. 711, 727, 141 S. W. 910; Degonia v. Railroad, 224 Mo. 564, 588, 123 S. W. 807; Shoe Co. v. Lisman, 85 Mo. App. 340, 344.]

Kerr v. Bush.

This error requires a new trial and we may say that while this instruction is copied from *Byars v. Railroad*, 161 Mo. App. 692, 702, the point on which we condemn it was not in that case; and we further say that it is subject to criticism (though not reversible error for this alone) in that it lays too much stress on the failure of ringing the bell. It reads as if the statute made the ringing of the bell the essential thing for which whistling is a substitute or excuse only. The form given in *Crumpley v. Railroad*, 111 Mo. 152, is better. Other verbal criticisms can be avoided at another trial. The case is reversed and remanded. *Farrington* and *Bradley, JJ.*, concur.

CASES DETERMINED
BY THE
ST. LOUIS, KANSAS CITY AND SPRINGFIELD
COURTS OF APPEALS
AT THE
MARCH TERM, 1918.

L. H. COCHRANE et al., Appellants, v. FIRST STATE BANK OF PICKTON, TEXAS, Interpleader, Respondent; CHARLES WARD et al., Garnishees, Appellants.

Kansas City Court of Appeals, March 4, 1918.

1. **JURY: Directed Verdict: Burden of Proof: Instructions.** Where one interpleads in an attachment suit, he assumes the position of plaintiff and the burden of proof rests upon him and where the testimony offered in support of the interplea is oral the credibility of the witnesses is for the jury and the court is without power to direct a verdict.
2. **BILLS OF LADING: Transfer of Property Shipped: Intention of Parties.** Bills of lading to shipper's order delivered to a bank puts the legal title to the property shipped in the bank, but where this is done, not to effect a sale of such property but merely to afford security, then the legal title does not pass to the bank. Whether there was a sale to the bank depends upon the intention of the parties.

Appeal from Jackson Circuit Court.—*Hon. Thomas B. Buckner, Judge.*

REVERSED AND REMANDED.

Hal R. Lebrecht for appellants.

Sherman & Landon for respondents.

TRIMBLE, J.—On the 17th and 18th days of July, 1916, J. C. Walters of Pickton, Texas, shipped to Kansas City, Missouri, three carloads of peaches on bills of lading to shipper's order with instructions to notify Ward Brothers. He drew two drafts on Ward Brothers at Kansas City, one for \$322.10 to which he attached the bill of lading issued on one car, and the other for \$539.10, to which he attached the bills of lading issued upon the other two cars. These drafts were not made payable to Walter's order but were payable to the First State Bank of Pickton, Texas.

On the 18th and 19th days of July, 1916, Ward Brothers telegraphed the bank guaranteeing 75 cents per bushel on one car shipped by Walters and 85 cents per bushel on the other two. After receiving these telegrams, the Bank received from Walters the said drafts, aggregating \$861.20, with the bills of lading thereto, attached, and deposited to Walters' credit on his checking account the amount of said drafts, less \$2.15 exchange. The Bank then sent the drafts to its proper correspondents to be sent to Kansas City for payment by Ward Brothers.

One of said cars arrived in Kansas City on July 20th and the other two on the 21st, but, as the bills of lading with drafts attached had not come, Ward Brothers requested Walters to have the railroad telegraph a release of the cars without payment of said drafts. Walters thereupon signed an order directed to the station agent at Pickton to release said cars without taking up the bills of lading, thus allowing the shipments to be delivered to Ward Brothers without payment of the drafts. The agent before wiring the release took the order, thus signed by Walters, to the Bank and the cashier wrote the Bank's name above that of Walters with the word "By" in front of his name. Thereupon, the agent sent to Ward Brothers the desired release and Ward Brothers obtained possession of the cars without a surrender of the bills of lading or payment of the drafts. Ward Brothers then sold the peaches, received the proceeds thereof and had said proceeds in their possession.

On July 31, 1916, the plaintiff brought suit by attachment in Jackson county, Missouri, against Walters, and on the same day garnished Ward Brothers, the writ directing them to appear at the September term, 1916, and answer interrogatories. When the drafts arrived in Kansas City and were presented to Ward Brothers some time in August, payment on them was refused and they were returned to the Pickton Bank.

On the return day of the writ, Ward Brothers, the garnishees, answered saying Walters had shipped them the three cars of fruit and that the amount due on said cars was \$520.62; that garnishees owed said amount, except \$123.75, which Walters owed them, leaving a net amount of \$396.87 owing by the garnishees to the shipper. The answer then stated that garnishees had been informed that the First State Bank of Pickton, Texas, claimed said amount and that garnishees were unable to state whether said sum of \$396.87 was owing by them to defendant Walters or should go to the plaintiff, and garnishees asked the court to direct them to whom to pay said sum, and to allow garnishees a reasonable amount for answer fee. No denial of this answer was filed by the plaintiffs or anyone else.

On the 20th of September, 1916, the Bank filed its interplea claiming that after the shipment, but before the cars were delivered to Ward Brothers and prior to the garnishment, the fruit contained in said cars was sold and delivered to the Bank, for which it had paid full value, and it thereupon became the owner thereof; and that the money garnished in the hands of Ward Brothers was not the property of Walters nor did he have any interest therein.

Plaintiffs' answer to the interplea was a general denial.

A trial of the issues made on the interplea was had before a jury, and at the close of all the evidence the interpleader Bank asked, and the court gave, a peremptory instruction to return a verdict in the interpleader's favor. This was done, and thereupon the court rendered judgment directing the garnishees to pay the sum of

\$520.62 to the interpleaders. Whereupon the plaintiffs and the garnishees separately perfected their respective appeals, but afterwards the two appeals were by stipulation consolidated.

The original proceeding in this case is the attachment suit, and the interplea by the Bank is another and independent action engrafted thereon, the purpose of which was to recover, as in replevin, the property attached. Hence, on the trial of the interplea, the interpleader assumed the position of plaintiff and had the burden of proof. [Torreyson v. Turnbaugh, 105 Mo. App. 439; Keet-Roundtree Dry Goods Co. v. Hodges, 175 Mo. App. 484.] This was recognized in the trial as the interpleader was accorded the opening and closing. Plaintiffs, therefore, complain of the action of the court in granting a peremptory instruction to find for interpleader urging that the latter had the burden of proof and the testimony in support of its case was oral and not conclusive upon plaintiffs; in which situation the credibility of the witnesses was for the jury. It is well settled that in such circumstances the court is without power to direct a verdict. [Fehrenbach Wine & Liquor Co. v. Atchison, Topeka and Santa Fe Ry. Co., 180 Mo. App. 1, 10; Warren v. New York Life Ins. Co., 182 S. W. 96.] So that if the circumstances of the case are such as to bring it within the rule, it calls for a reversal and remanding of the cause upon this point alone.

Considering whether the case comes within the above rule, it will be observed that the question at issue in the trial of the interplea was: Who was the owner of the peaches (and consequently entitled to their proceeds) at the time of their delivery to Ward Brothers? The theory of the Interpleader Bank is that when Walters delivered the drafts and the bills of lading to the Bank and received credit for the amount thereof as a deposit in his account, this was *a sale of the peaches to the Bank* and, therefore, at the time the peaches were received by Ward Brothers, the Bank, and not Walters, owned them and was entitled to their proceeds; hence the proceeds were not subject to

plaintiffs' attachment as the property of Walters. On the other hand, plaintiffs' theory was, and is, that the transaction between Walters and the Bank was not a sale of the peaches themselves but a mere deposit of the amount represented by the drafts, the Bank receiving the drafts, in exchange leaving Walters still the owner of the proceeds subject to the garnishment of his attaching creditor.

It is disclosed by the evidence of Interpleader's cashier, its witness, that when the drafts were returned, the Bank charged the amount thereof back to Walters' account and that at that time there was enough and more than enough funds on deposit to Walters' credit to reimburse the Bank, but that after the drafts had thus been taken out of Walters' deposit account he learned of it and protested against it, but agreed to let matters stand thus "temporarily" on condition that the Bank let him go ahead checking on his account the same as if the amount of the drafts was on deposit to his credit. This the Bank permitted until some time in November, 1916, when it replaced the amount of said drafts to Walters' credit in his deposit account; that during the larger portion of the time between the charging back of the drafts and the recrediting of said account with the amount thereof Walters' account had more than sufficient funds to take care of said drafts. This charging back of the drafts to Walters' account at a time when there were plenty of funds therein to cover them is a circumstance not in the case of *Hass v. Kings County Fruit Co.*, 183 S. W. 676, and *Jefferson Bank v. Merchants Refrigerating Co.*, 236 Mo. 407, 415, upon which interpleader relies. And it is for this reason that plaintiffs say those cases are not in point.

But interpleader insists that Walters checked out the exact amount of the drafts on the day the Bank took them, and that when the drafts were returned unpaid and were by the Bank taken out of Walters' deposit account, Walters did not agree to it, but protested, and the Bank, acceding to Walters' protests, made an agreement to let matters stand temporarily

as they were, with Walters having the privilege of checking on the account as though the amount of the drafts were still to his credit, and that the Bank did finally replace said amount in his deposit account. It would seem that if the Bank took the amount of the drafts out of the deposit account when they returned unpaid, it thereby was repaid the amount it had given for the drafts and it could not thereafter, with notice of plaintiffs' attachment, return the money to Walters' account and look to the proceeds of the peaches. But interpleader says that Walters did not agree to the drafts being charged back to him, and therefore, the Bank's attempt to do so was abortive so that the Bank had to replace the money in Walters' account and look solely to the proceeds. The trouble with this contention (if the transaction between Walters and the Bank, with reference to the drafts and bills of lading, was a mere exchange of a credit of deposit for the drafts with the bills of lading *as security*), is that the Bank had the right to thus charge the drafts back to Walters' account whether he agreed to it or not. The general rule is that a bank may apply the debtor's deposits on his debts to the bank as they become due, and while it is sometimes said that a bank has a lien on the deposits • for this purpose, the more accurate statement is this, that the right of the bank is not really in the nature of a lien, but is rather a right of setoff or application of payments, and the exercise of the right is *optional* with the bank. [7 Corpus Juris., Sec. 351, pp. 653-4-5; Muench v. Valley National Bank, 11 Mo. App. 144.] It would seem, therefore, that if the Bank merely exchanged a deposit credit for the drafts and took the bills of lading *as security*, then its recharging of the drafts against the depositor's account at a time when there was sufficient funds to take care of the drafts, was a recovery of the money it had paid for them. The fact that this was without Walters' consent made no difference, since the Bank had the legal right to do this. And under these circumstances, the fact that thereafter the Bank, with knowledge of plaintiffs' attach-

ment, acceded to Walters' demands and replaced the money to his credit, would be a matter of the bank's own lookout and not a matter which the Bank could rely upon in an effort to defeat plaintiffs' attachment lien. The fact that the drafts were made payable direct to the Bank and were not endorsed by Walters to the Bank makes no difference since the deposit credit was given in exchange for the drafts and the exchange was made subject to the condition that the drafts be fully paid. The deposit slip issued by the Bank for this deposit had on it "all checks and drafts credited subject to full payment." Besides, the drawer of the draft, which was returned dishonored, would be primarily liable for the amount of money he had obtained thereon.

What has been said in the foregoing is on the theory that the original transaction between the Bank and Walters was over the drafts with the bills of lading merely *as security* therefor. But if the transaction between them was *a sale of the peaches* to the Bank, then doubtless the Bank could not go back upon its purchase and take its money back without Walters' consent.

Now, it is undoubtedly true that by the delivery to the bank of the bills of lading to shipper's order, the *legal title* to the peaches was put in the bank; but this may have been done, not to effect a sale of the peaches to the bank but merely to afford it security, just as the legal title to property is put in another by way of mortgage, so that whether the transaction was a sale of the peaches to the bank or was merely a transfer of the legal title as security, would depend upon the intention of the parties to be determined in the light of all the circumstances and their conduct in the premises. Now, the evidence is in such shape that different inferences might be drawn from the transaction. In one view of the evidence it might be taken to mean that Walters contracted for a sale of the peaches to Ward Brothers but before delivery he sold the peaches to the Bank and that at the time they

were delivered to Ward Brothers the Bank was the owner thereof and was entitled to the proceeds. In which case, such proceeds could not be subject to garnishment for Walters' debt. On the other hand, the circumstances tend very strongly to show that, in the transaction between Walters and the Bank, a sale of the peaches *to the bank* was not thought of. In fact, it is hardly probable that the bank understood or thought it was buying peaches. The assumption would be rather that it was dealing in commercial paper—the objects of its usual and ordinary business. However, whether there was a sale of the peaches *to the bank*, depends upon what was the intention of the parties to the transaction at the time, and this intention is not determined merely by what they now say about it, but also by the transaction itself viewed in the light of their acts and course of conduct under all the circumstances. We cannot say, as a matter of law, that there was no sale of the peaches to the bank. Hence, we cannot, upon a reversal of the judgment, direct a judgment to be rendered in plaintiffs' favor. Neither can it be said, as a matter of law, that there was a sale of the peaches to the bank. Indeed, a large portion of interpleader's case rests upon the oral testimony of the bank's cashier, and, as his credibility was a matter for the jury to pass on, the trial court could not direct a verdict in interpleader's favor. Nor does the testimony offered by plaintiffs conclusively show a sale of the peaches to the bank. It shows rather a sale to Ward Brothers and Walters' testimony that he refused to consent to the charging of the drafts back to his account may be referred as well to his view of the law as to the bank's right to do so, as to the view that he knew he had sold the peaches to the bank. In fact, he never at any time said he sold the peaches to the bank but did say he sold the peaches to Ward Brothers subject to their guarantee to the bank that they would pay so much per bushel for them.

We are, therefore, of the opinion that the case should have been submitted to the jury, under proper in-

structions, leaving it to them to say what was intended in the transaction between Walters and the Bank and who was the *owner* of the peaches at the time Ward Brothers received them. If the Bank took the bills of lading as mere security, then it released that security when it authorized the railroad to deliver the peaches without payment of the drafts. On the other hand, if it bought the peaches and paid for them by depositing the amount of the drafts to Walters' credit, then it was the owner of the peaches at the time of their delivery to Ward Brothers and consequently the owner of the proceeds of said fruit; and if the bank bought the peaches, it could not thereafter charge the drafts against Walters' account, thus rescinding the sale, without the latter's consent.

The reversal and remanding of the case on the feature considered, would still leave the question of garnishees' appeal undisposed of and as this question will arise upon a trial anew, it should be disposed of now.

It will be remembered that the answer of the garnishees says the peaches brought, less expenses and commissions, \$520.62, but that Walters owed them \$123.75 which they have deducted from \$520.62, leaving \$396.87 as the amount they owe. The judgment of the court was to pay over the full \$520.62. It was stipulated between the garnishees and the interpleader that the \$123.75 was a debt owed by Walters to garnishees over a matter entirely disconnected from the shipments involved. Hence, if before the peaches came into the interpleader's hands they were *owned* by the Bank and not by Walters, the garnishees, if they had notice of the Bank's interest therein, could not apply a part of the proceeds to pay Walters' debt to them. The attachment in this case being against a non-resident and jurisdiction being obtained only by virtue of the property attached—i. e., the money garnished, the proceeding is one *in rem*. [7 R. C. L. 777.] Being a proceeding *in rem* it is good against the world as to that property, and if any out-

sider wants to assert and protect his rights therein he must come in and do so.

The garnishees have asked the court to determine to whom the court shall pay the debt it owes. True, they say they owe only \$396.87, but if interpleader is entitled to recover at all, garnishees do not owe Walters anything, but owe the whole \$520.62 to the interpleader. It would seem that having asked the court to direct them to whom to pay the amount due, and the case being one *in rem*, and the garnishees not asking to participate in the litigation between plaintiffs and the interpleader to determine the ownership of the proceeds, the garnishees must abide the result of that litigation and if the interpleader wins they will have to pay the whole \$520.62 while if plaintiffs win, the garnishees will have to pay only the \$396.87.

The judgment is reversed and the cause is remanded. All concur.

IDA CULP, Appellant, v. SUPREME LODGE
KNIGHTS OF PYTHIAS, a Corporation, Re-
spondent.

Kansas City Court of Appeals, March 4, 1918.

1. **NEW TRIAL: Second New Trial: Errors of Law.** Where one new trial was granted for errors of law committed by the trial judge, namely, in admitting evidence offered by plaintiff and in excluding evidence offered by defendant, the fact that the judge also gave as a third reason that the verdict was against the weight of the evidence, the granting of a second new trial on the last-mentioned ground was not forbidden by section 2023, R. S. 1909, since said section imposes no limit on the number of new trials granted on account of errors committed, and a litigant is entitled to one new trial solely on the ground that the verdict is against the weight of the evidence if the trial court is of the opinion that such is the case.
2. ———: ———: ———: **Statute Construed.** Section 2023, as construed by the courts, means that a party is entitled to one new trial where the verdict is against the weight of the evidence, but he is

Culp v. K. of P.

forbidden from getting a second new trial on that ground, or from getting a new trial twice upon a ground not coming within the exceptions of the statute.

Appeal from Clinton Circuit Court.—*Hon. Alonzo D. Burns*, Judge.

AFFIRMED.

Ed. E. Aleshire, S. M. Young and F. B. Klepper for appellant.

New, Miller, Camack & Winger, L. W. Reed and R. H. Musser for respondent.

TRIMBLE, J.—This is an action on a certificate of life insurance, dated May 1, 1912, issued to and upon the life of Clyde L. Culp by defendant, a fraternal beneficiary society, with the plaintiff, Ida W. Culp, named therein as beneficiary.

The defense was that insured, in procuring the certificate, had made false and fraudulent representations in regard to his health; also that shortly after the policy was issued, and as soon as the misrepresentations were discovered by the defendant, it, on notice to the insured and after opportunity given him to be heard, cancelled the policy because of said misrepresentations and notified insured of that fact and returned to him his premium; all of which was done pursuant to defendant's by-laws which insured had agreed should constitute a part of the insurance contract along with the application and certificate.

A trial in the circuit court of Clinton county resulted in a verdict for plaintiff in the full amount of the policy with interest. Defendant's motion for a new trial was sustained, the order reciting that it was done "on the sole ground that the jury disregarded the law given by the court in instruction number one (1) for the defendant." Plaintiff appealed.

Instruction No. 1 for defendant, which the court says the jury disregarded, is as follows:

"The court instructs the jury that if they find and believe from the evidence that after the execution and delivery of the policy in controversy, and after the defendant company obtained knowledge of misrepresentation and fraud, if any, by the applicant, the defendant company, in compliance with by-laws of said company, gave to said Clyde L. Culp, thirty days' written notice to show cause to the Board of Control of defendant company why said policy should not be cancelled, and that such notice was given said Clyde L. Culp by registered United States Mail at his then known post-office address, and that said Culp had an opportunity to be heard before said Board of Control and failed to appear, or ask to be heard, or defend against cancellation of the said policy, and that said Board of Control, after a hearing directed the cancellation of the policy in this suit, and notified said Culp of said cancellation, then the policy became thereby null and void, regardless of any waiver by defendant company as to false representations, if any, and your verdict must be for the defendant."

Appellant asserts that, in a former trial of the case in the circuit court of Clay county, that court set aside a verdict for plaintiff on several grounds, one of which was that the verdict was against the weight of the evidence. Her contention, therefore, now is that the action of the Clinton court, in granting a new trial on the ground that "the jury disregarded the law" given in the instruction quoted above, assigned no reason known to the law unless the said reason be construed as merely another way of saying that the verdict was against the weight of the evidence in support of the defense of cancellation; that the reason given by the court, when considered in connection with the instruction and the evidence on the issues before the jury, was tantamount to saying that the verdict was against the weight of the evidence, and, as section 2023, Revised Statutes 1909, forbids the granting of more than one new trial on that ground, the court could not do indirectly that which the statute forbade him doing directly.

It is a very grave and serious question whether plaintiff has properly preserved the alleged fact that the Clay circuit court, in granting a new trial to defendant gave as one of its reasons therefor that the verdict was against the weight of the evidence. If such action was taken, and the *reasons for granting* the new trial in the Clay circuit court are a part of the record proper the same as the *fact that a new trial was granted*, then, in order to preserve the reasons for which such former new trial was given, the appellant here should have printed, as a part of her abstract of the record proper, the record of the Clay circuit court showing such action. If, however, the *reasons* for which the former new trial was granted were mere matters of exception then the same should have been offered in evidence on the second trial and preserved by being incorporated in the bill of exceptions. It is clear that she did not include it in her abstract of the bill of exceptions and it is a question whether she has preserved it in her abstract of the record proper.

Plaintiff's abstract of the record proper begins with the petition as if the case originated in the circuit court of Clinton county. Then follows the answer, the reply, the record of the trial, the verdict and judgment in the Clinton circuit court, the motion for new trial filed by defendant, the sustaining of that motion for the reason given, the filing by plaintiff of an application and affidavit for appeal, the allowance thereof, the granting of time to file bill of exceptions, the filing thereof and the duly filing of the appeal in the Court of Appeals.

This would seem to be the end of appellant's abstract of the record proper. On the next page is a statement to the effect that "In order that this court may understand more of the past history of this case, we are printing herewith, a short record coming from the Clerk of the Court of Clay county, Missouri." Then follows a statement of counsel that the case was originally tried in Caldwell county, from which, on a verdict for defendant, it was appealed to this court, was reversed and remanded, and a change of venue taken to Clay county

where a verdict was obtained by plaintiff which was set aside on motion for new trial for the reason stated in the record of the case; and that after that the judge of the Clay circuit court disqualified himself and the case went by agreement to Clinton county. The statement then says "the record referred to bears the following certificate." Here follows a copy of the certificate of the Clerk of the Clay circuit court certifying that "the foregoing" is a full, true and complete copy of the record and proceedings in the case in that court. After this certificate comes this statement: "In this record we find the following:" Then follows what purports to be a copy of a part of a motion for new trial by defendant and then an order of court sustaining the motion on three grounds, one because of error in admitting evidence in behalf of plaintiff, another because of error in excluding evidence offered by defendant and a third because the verdict was against the weight of the evidence. Next is shown the record of the filing of a stipulation to transfer the case to the Clinton circuit court and following this comes a statement that the case was transferred to the circuit court of Clinton county. Appellant then starts off with her printed abstract of the bill of exceptions.

Looked at in one way it would appear as if the appellant had not abstracted the action of the Clay circuit court in her abstract of the record proper but had merely inserted between her abstract of the record proper and her abstract of the bill of exceptions an explanatory statement by counsel to the effect that it appeared from a certified copy obtained from the Clay circuit clerk, that a former new trial had been granted defendant for certain reasons, one of them being that the verdict was against the weight of the evidence. But while the abstract is somewhat confused and apparently misleading, yet, as the reasons are set forth in the order of the Clay circuit court granting the new trial, they became a part of the record proper that was certified on change of venue to Clinton county, and were a part of the record proper in the Clinton court, and hence are preservable,

and should appear, in the abstract of the record proper on this appeal. Now, inasmuch as there appears, along with the printed abstract of the proceedings in the Clay circuit court, a statement that said record certified to by the Clay circuit clerk reached Clinton county and was filed in that court as shown by the file mark thereon, as follows: "Filed September 11, 1916. A. E. Stone, Clerk Circuit Court," we have come to the conclusion that this shows that what appellant is here abstracting is not a mere statement from counsel as to what was formerly done in the Clay circuit court, but is an abstract of the transcript sent from Clay county to the Clinton court and which is a part of the record therein. Hence we may properly regard the whole, both the record in the Clay as well as in the Clinton circuit court, as appellant's abstract of the record proper. If this be so, then we may properly take notice of the action of the Clay circuit court and of its reasons for granting defendant a new trial.

But, even so, is appellant entitled to have the action of the Clinton circuit court set aside and reversed? Section 2023 Revised Statutes 1909, which appellant claims the court violated, says: "Only one new trial shall be allowed to either party except: First, where the triers of the fact shall have erred in a matter of law; second, when the jury shall be be guilty of misbehavior," etc. The trial court says it granted a new trial because the jury "disregarded the law" as given in said instruction. If the trial judge, by reason of his opportunities of seeing and knowing what really took place in the trial court, says the jury *gave no heed to the law* as given by the court, can it be said that it *conclusively* appears that the jury did not refuse to follow the law but did refuse to *accept* the facts on which the application of the law rested? This may, perhaps, be the case if there is any substantial evidence controverting the facts upon which the law was predicated or if the evidence of those facts is such that the jury are not bound to believe it. However, we need not decide this question owing to the facts of this particular case. For even conceding, but

without deciding, that the reason given by the Clinton court for granting the new trial can only be construed to mean that the verdict is against the weight of the evidence, still, is appellant entitled, under the facts of this case, to have the court's action reversed?

It will be observed that the former new trial was granted by the Clay circuit court for *three* reasons herein above set out. And as the plaintiff abided that order we must regard defendant as being entitled to a new trial because of each one of the first two. In other words, defendant did not have a fair trial in the Clay circuit court because of error in the admission of evidence in plaintiff's behalf and also because of the exclusion of evidence offered in defendant's favor. Hence defendant was then entitled to a new trial on account of errors in matters of law. It is well established that section 2023 imposes no limit on the number of new trials granted on account of errors committed during the trial. [State ex rel. v. Horner, 86 Mo. 71; Langston v. Southern Electric R. Co., 147 Mo. 457.] Here, then, we have defendant entitled to and granted a new trial because of errors committed against it. It did not have a fair and legal trial, and is entitled on account of those errors to a new trial regardless of anything else. But it is entitled to *one* new trial *solely* on the ground that the verdict is against the weight of the evidence if the trial court is of the opinion that such is the case. And if the reason given by the Clinton circuit court must be taken to mean that the verdict is against the weight of the evidence, then, according to appellant's contention, the judgment granting a new trial must be reversed even though defendant was justly entitled to and was granted the first new trial on other grounds. Stated in another way, appellant's contention is really this: Although defendant was justly entitled to the first new trial on account of errors committed against it, and although defendant is entitled to one new trial where the verdict is against the weight of the evidence, nevertheless, defendant cannot now obtain the benefit of this right merely because the Clay circuit

court inserted that as an additional reason for granting its new trial. We do not think that section 2023, as construed by the courts, means this. What is meant is that a party is entitled to one new trial where the verdict is against the weight of the evidence, but he is forbidden from getting a second new trial on that ground, or from getting a new trial twice upon a ground not coming within the exceptions of the statute. In *Kries v. Missouri etc., R. Co.*, 131 Mo. 533, l. c. 544, it is said: "A proper construction of the statute gives the trial court the right to grant to either party one new trial on the ground of the insufficiency of the evidence to support the verdict of the jury, regardless of the number of new trials that may have been granted to such party upon other grounds." At the trial in Clay county the defendant, on account of errors committed, was entitled to a new trial, and such right was complete without regard to any additional reason which the court may have stated. And the insertion of such additional reason ought not to deprive the party of its right to one new trial solely on the ground that the verdict is against the weight of the evidence. For, since defendant's first trial was not legal because of errors committed by the court, defendant has not exercised its right to have one new trial solely because the verdict was against the weight of the evidence. Indeed, how can the first court be in a position to rightfully and at once for all, say the verdict is against the weight of the evidence when concededly a portion of the evidence properly admissible was excluded and was not allowed to be laid before the jury? We think that under the facts in this case appellant has not shown a new trial granted the second time because the verdict was against the weight of the evidence within the meaning of the prohibition of the statute. If that is the case then the action of the trial court must be upheld if there is substantial evidence on which the court's action can be justified. [*Dorsett v. Chambers*, 187 Mo. App. 276, 280; *Pepper v. Pepper*, 241 Mo. 260.] As to that, there was abundant proof of misrepresentations and of a due cancellation of

the policy on that ground and very slight proof, if any, in opposition thereto.

The judgment is affirmed. All concur.

CHAS. P. HESS, Attorney in Fact for ANNA JANE GLEASON et al., Appellant, v. ANNA SANDNER, Executrix of the Estate of FREDERICK SANDNER, Deceased, Respondent.

Kansas City Court of Appeals, March 4, 1918.

1. **JURISDICTION: Courts: Probate: Demands against Estates.** The Constitution and statutes give probate courts jurisdiction over the allowance of any demand against the estate of a deceased person, and this is broad enough to include demands of every nature whether legal or equitable.
2. ———: ———: ———: ———. Although a probate court has jurisdiction to allow demands of every nature whether legal or equitable, this does not mean that the probate court can be turned into a court of equity to establish the existence of a trust which is denied and the existence of which can be established, if at all, by a court of equity. The cases in which it is said that the probate court has jurisdiction of demands of every nature whether legal or equitable are where the estate had received the property of another, or of the claimant under circumstances which either in law or equity established the relation of debtor and creditor between them. But in a case where the claimant must first obtain equitable relief before he can claim to be a creditor or to have even an equitable right to any property of the estate, the adjudication of such prior equitable right is purely the function of a court of equity, and to permit a probate court to do this is not merely allowing it to make use of and apply equitable principles in the settlement of the *debts* of an estate, but it is authorizing it to exercise the jurisdiction of a court of equity which cannot be done.

Appeal from Macon Circuit Court.—*Hon. Vernon L. Drain*, Judge.

AFFIRMED.

Nat M. Shelton, James Whitecotton and Lacy & Shelton for appellant.

Andrew Field, Webb M. Rubey and Guthrie & Franklin for respondent.

TRIMBLE, J.—This was an action brought in the probate court to establish a demand of \$598 against the estate of Frederick Sandner, deceased. The proceeding is in behalf of the widow and adult children of Nicholas Sandner, deceased, who was a son of the decedent Frederick Sandner. The estate contended that the matter was cognizable only in a court of equity and that for this reason the probate court had no jurisdiction. This contention was overruled and a hearing of the case resulted in an allowance of the demand. The estate appealed to the circuit court and there filed a motion to dismiss on the ground that the probate court had no jurisdiction and that none could be acquired by the circuit court on appeal. This motion was sustained and the cause dismissed. From which dismissal the case comes here on appeal.

In order that the nature of the action may appear, a statement of the allegations in the petition is necessary. It alleges that Frederick Sandner in his lifetime owned 280 acres of land and, wishing to dispose of and divide the same among his children, he sold it to his son John F. Sandner for \$11,200 to be distributed between all of his children, the children of his dead son Nicholas to receive their father's share.

That on September 17, 1913, said Frederick Sandner entered into a written contract with said John F. Sandner which contract was set out *in haec verba*. The contract thus pleaded and set up is signed by Frederick Sandner and John F. Sandner. It states that the former has this day conveyed to the latter the 280-acre farm, describing it, and that the consideration is \$11,200; that the deed to said farm is deposited with the Rubey Trust Company of Macon, Missouri, to be held in escrow until March 1, 1914, at which time the Trust Company is

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directed to deliver it to the grantee upon the payment by him to said Trust Company of \$9351 to be immediately paid by it to the following persons and in the sums as follows:

"To George B. Sandner	\$1140.00
To Jacob Sandner	1568.00
To Mrs. Katie Little	1515.00
To Pete Sandner	1515.00
To Miss Anna W. Sandner	2315.00
To <i>Frederick Sandner, the grantor</i> ,	1298.00"

Said contract further states that Trust Company was not to deliver the deed until it had received the above amounts and that if the said John F. Sandner failed to pay the \$9351 to the Trust Company on or before March 15, 1914, then the latter was to surrender the deed to the grantor or his legal representative. Then follows the signatures of the parties to the contract.

The petition then alleged that "it was the aim and intention of Frederick Sandner to divide the purchase money of said farm equally among his children and that in order to do so he took in consideration the various amounts advanced by him to each individual child, and, under the contract aforesaid, ordered the Rubey Trust Company to pay each of his children the sums designated in said contract, and on account of three of the children of Nicholas Sandner being minors and having no guardian, he, the said Frederick Sandner, made the amount due to the children of Nicholas Sandner to be paid to him, the said Frederick Sandner, by said Rubey Trust Company, to be paid by him to the children of said Nicholas Sandner."

The petition then alleged that the Trust Company fully complied with all the conditions of the contract and paid each party named therein the amount due "and did pay to Frederick Sandner the sum of twelve hundred and ninety-eight (\$1298) dollars to be held in trust for children of Nicholas Sandner, deceased, to be paid to them by said Frederick Sandner."

The petition then alleged that "in compliance with said trust" said Frederick Sandner paid to the

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widow of Nicholas Sandner, for the use of the three minor children of said Nicholas Sandner, the sum of \$700 on October 14, 1914, "but made no further payment to any of the other children and plaintiffs in this cause."

The petition then charged that the defendant as executrix of said estate "took possession of said trust fund" and holds possession of the sum of \$598 which is due to the adult children of Nicholas Sandner, wherefore judgment was prayed for this amount.

It has been frequently held that the Constitution and statutes of the State give probate courts jurisdiction over the allowance of *any demand* against the estates of deceased persons, and that this is broad enough to include "demands of what every nature whether legal or equitable." [Hammons v. Renfrow, 84 Mo. 332; Maginn v. Green, 67 Mo. App. 616; Hoffman v. Hoffman, 126 Mo. 486; Grimes v. Reynolds, 94 Mo. App. 576; Lietman v. Lietman, 149 Mo. 112; Jarboe v. Jarboe, 227 Mo. 59.] But it will be noticed that this phrase is used in reference to claims wherein there is the element of debtor and creditor between the estate and the claimant whether such debt arises in law or in equity. In other words the function of the probate court is to adjudicate and allow claims which, by virtue of either legal or equitable principles, can be regarded as a *debt* due the claimant and the latter can be viewed in the light of a *creditor* of the estate. And in the determination of these matters, as well as in the settlement and distribution of the estate, the probate court is fully vested with power to adopt and apply equitable principles. But this does not mean that a probate court can be turned into a court of equity and exercise the jurisdiction of such a court in behalf of a claimant who does not stand in the relation of a creditor to the estate but comes merely as the *cestui que trust* of a trust fund of which the decedent is alleged to be the trustee, and the existence of which is not conceded but which can be established, if at all, only by a court of equity. An examination of the facts in the cases herein above

cited will disclose that in every one of them the estate had received the property of another or of the claimant under circumstances which either in law or equity established the relation of debtor and creditor between them. For instance, in the Renfrow case a husband received property from his wife under a contract, valid in equity, that is was not to become his absolute property but would remain hers or her minor children's. Thus, in the application of equitable principles, it was manifest that the relation of debtor and creditor existed which the probate court could adjudicate and settle. The Supreme Court say (184 Mo. 341) the case is "more in the nature of an action at law, for money had and received on the part of the estate for the use and benefit of said children than an action or bill in chancery for matters of purely equitable cognizance." In the Maginn case the decedent had received money from Anna Walsh to be lent out by him and the interest paid to her, and at her death the principal was to be paid to her daughter. Here again, the decedent's receipt of the money created a relationship of debtor and creditor and the demand presented against the estate was an election to treat the estate as such. As said in Winn v. Riley, "By electing to treat him (decedent) as a debtor, the indebtedness although growing out of this trust relationship became a money demand against his estate over which the probate court had jurisdiction." In the Hoffman case a husband by a marriage contract agreed to keep only the income of all money he received from his wife's property and to secure to her or her heirs the principal thereof at his death. Here was an *admitted* executed trust creating the relation of debtor on the part of the decedent and his estate which the probate court, in the application of equitable principles, could adjudicate by merely ascertaining the amount of money so received and allowing a demand for that amount. In the Grimes case the subject of the demand was a note given by the husband for money belonging to his wife's separate estate. This was merely a demand for money had and received. And so on in all the other cases.

The subject-matter of the claim was either property of another coming into the hands of the decedent, or the claim was based on contractual obligations of the deceased with another, whereby either in the application of equitable principles or of legal rules, the court could say the relation of debtor existed and afford relief by a mere judgment for a money demand.

But in the case at bar there is confessedly no relation of *debtor* on the part of the estate to the claimants. The estate has received no money belonging to them. The money sought to be recovered never became theirs either as a gift or as an executed voluntary trust. The most that can be said of the matter is that the decedent sold his farm and directed the Rubey Trust Company to collect the proceeds and pay it to various persons therein designated and pay the balance to himself. Nothing is said in the pleaded written contract about why the money directed to be paid to the grantor in the deed should be paid to him and the only reason for it is the very good one that it was his. Whatever he may have *intended* to do, it is certain that he never lost control over the money paid to him, and that although the contract put up with the Rubey Trust Company could be enforced by the grantee in the deed upon payment of the money required of him within the time specified, still, so far as the distribution of that money was concerned, the decedent Frederick Sandner, could have recalled that and directed the bank at any time before they paid it out to pay it all to him. So that, until the money was paid to the distributees, the matter was entirely voluntary and without consideration on the part of Mr. Sandner. Until then, what he had done did not amount to a gift because it was not completed by delivery, nor could it be considered a voluntary executed trust. And as the money paid to himself was his anyway, his receipt of it could not constitute him either in law or equity, a debtor in any sense to the claimants. He had never lost control of it or placed it beyond his power to recall. It could not be regarded as

a gift until completed by delivery nor could it be regarded as a voluntary trust because it was never executed as to the claimants herein. [Harris Banking Co. v. Miller, 190 Mo. 640; Brannock v. Magoon, 141 Mo. App. 316, 321.] So that the cause of action presented herein is not one wherein the relation of debtor and creditor exists upon which the probate court is asked to merely ascertain that fact and determine the amount due and allow it against the estate. But the situation is one wherein the claimants must first obtain equitable relief, if they are entitled to any at all, before they are in any position whatever to assert that the decedent was trustee of a fund of which they are the *cestui que trust*; and it is only by reason of that relation when established, if at all, and not through any relation of debtor and creditor, that they can proceed against the estate. The sole basis of any right in them whatever, (if they have any right), depends upon the establishment of a voluntary executed trust in personal property on the part of decedent in their behalf. And this must be done before they can successfully claim even an equitable right to any property of the estate. The adjudication of whether there was or was not a valid, voluntary, executed trust would seem to be *purely* the function of a court of equity, and if, by merely calling a claim a demand and filing it against the estate in the probate court, the latter can be given jurisdiction to adjudge and decree that such a trust was created and that the claimants are entitled to it as *cestui que trust*, then this is not merely permitting the probate court to make use of and apply equitable principles in the settlement of the *debts* of an estate, but it is authorizing it to *exercise the jurisdiction of a court of equity*. Under the facts of this case, as affirmatively disclosed by the pleadings, we are of the opinion that the action of the trial court was right. The judgment is, therefore, affirmed. All concur.

**FRANK TAYLOR, Respondent, v. GEORGE HELTER,
Appellant.****St. Louis Court of Appeals. Opinion Filed March 5, 1918.**

1. **PROCESS: Return: Recital of Place of Service.** Under Revised Statutes 1909, section 1763, requiring return of service of writ to recite the place of service, a return of writ served on Sunday, reciting, to bring the service within section 1785, as to Sunday service, that the person served was a nonresident of the State, and that at the time of service was about leaving the county and State, but not referring to the place of service, was insufficient, since nothing can be presumed in favor of the return, but it must show on its face that every statutory requisite has been complied with.
2. ———: ———: ———: **Caption.** Under this statute, a return, not referring to place of service, is not aided by presumption or intendment from the caption prefixed thereto, "State of Missouri, County of Pike—ss."
3. ———: ———: **Not Aided by Extrinsic Evidence.** The recitals of the return cannot be aided or enlarged by extrinsic evidence.
4. ———: ———: **Amendment.** Where recitals of a return are insufficient, upon proper application the trial court may allow amendment of the return.

**Appeal from the Circuit Court of Pike County.—Hon.
Edgar B. Woolfolk, Judge.**

REVERSED AND REMANDED.

Hostetter & Haley for appellant.

(1) The sheriff's return is invalid and will not support the default judgment. The sheriff's return recites two things, viz: 1st. That defendant is a non-resident of this State, and 2nd. That at the time of the service he "was about leaving the county and the State." Section 1785, R. S. 1909, clearly refers to conditions under which residents of the State may be served. Other statutes relate to and control the manner of obtaining service on nonresidents. The return does not show the place of service. The "time,

place and manner of service" must be affirmatively shown in writing in order to meet the requirements of the statute. Sec. 1763, R. S. 1909. Everything may be inferred against a return which its departure from the statute as to service will warrant. *Blanton v. Jamison*, 3 Mo. 52; *Madison Co. Bank v. Suman*, 79 Mo. 527. Even though an inference might be drawn from the caption to the return that the process was actually served in Pike County, Missouri, yet under the statute above cited, viz., Sec. 1763, R. S. 1909, the place of service must be affirmatively shown in writing. Parol evidence is incompetent to piece out a return. *Madison County Bank v. Suman*, 79 Mo. 531. The return of an officer is a part of the record, as much so as the pleadings and the judgment; it is conclusive as to the fact recited; it cannot be impeached collaterally; the remedy of a party injured by a false return is to sue the officer and his sureties; its imperfect recitals cannot be aided by extrinsic evidence. *Samuels v. Shelton*, 48 Mo. 444; *McClure v. McClurg*, 53 Mo. 173; *Wannell v. Kem*, 57 Mo. 478; *McDonald v. Leewright*, 31 Mo. 29; *Delinger v. Higgins*, 26 Mo. 180; *Richardson v. George*, 34 Mo. 108; *Bateson v. Clark*, 37 Mo. 31; *Reeves v. Reeves*, 33 Mo. 28; *Brown v. Langlois*, 70 Mo. 226; *Hallowell v. Page*, 24 Mo. 590. There is no statute authorizing the issuance of a summons against nonresidents to be served in this State. Sec. 1778, R. S. 1909, does provide for personal service on nonresident defendants, but said section provides that the summons shall be sent to the foreign State or territory and there served; such personal service on nonresidents as is contemplated by section 1778 has only the force and effect of a service made by an order of publication, and is insufficient to support a personal judgment. *Moss v. Fitch*, 212 Mo. 484; *Hedrix v. Hedrix*, 103 Mo. App. 40. Section 1770 prescribes the method of obtaining service on nonresidents. Where there are several defendants, part of them residents and part of them nonresidents, those who are nonresidents are under

the provisions of section 1770 notified by order of publication, and as to those who are residents, under the provisions of section 1771 "process shall be issued against them as in other cases." Section 1772 provides for an order of publication against nonresidents based on a *non est* return of the officer. These sections accentuate the correctness of our contention that section 1785 which makes an exception to the prohibition against the service of writs on Sunday, "when the defendant is about leaving the county," that this means residents of the State against whom personal process is lawfully authorized to be issued, and not against nonresidents who can only, under the statute, be notified by publication, or if personally served can only be served in the foreign jurisdictions under the provisions of section 1778. Section 1785, R. S. 1909, relates only in its prohibitive features to personal service on Sunday or other legal holidays, and not to constructive service as in the case of nonresidents. *Barber Asphalt Pav. Co. v. Muchenberger*, 105 Mo. App. 51. (2) The case being not a triable case, as there was less than thirty days' service before the December term, 1914, and the default judgment and the final judgment were both rendered at the December term, 1914, the court refusing to hear the defendant at all or to permit him to plead was a palpable abuse of the discretion of the court, and is unwarranted by the law. Pike County has less than 40,000 inhabitants, and of this fact the courts will take judicial notice. *Moutz v. Moran*, 172 S. W. 613. This suit, being one for unliquidated damages and brought in a county containing less than 40,000 inhabitants, and service (assuming it valid) being more than fifteen days and less than thirty days, was not triable at the return term, in any event; at the return term plaintiff might under the provisions of section 2093, R. S. 1909, take an interlocutory judgment by default; but he had no right to proceed to final judgment at the return term. This can only be done in counties having 40,000 inhabitants or less, in suits where there is thirty days'

service and in actions on notes, bonds, etc., where there is fifteen days' service. Sec. 1799, R. S. 1909; Secs. 1757, 1758, 1777, 2093, and 2098, R. S. 1909; *Moutz v. Moran*, 172 S. W. 615; *Miller v. Gordon*, 96 Mo. App. 395, 70 S. W. 269; *Reed v. Nicholson*, 158 Mo. 624, 59 S. W. 977.

Tapley & Fitzgerald for respondent.

ALLEN, J.—Plaintiff instituted this action in the circuit court of Pike county seeking to recover the sum of \$2490 as damages alleged to have been sustained by him by reason of false and fraudulent representations charged to have been made by the defendant in the course of a transaction whereby plaintiff exchanged certain real estate for real estate belonging to the defendant. The defendant was served with a writ of summons on November 15, 1914, that day being Sunday. The sheriff's return, endorsed upon the writ, is as follows:

"I hereby certify that I served the within writ and process on the within named defendant, George W. Helter, by delivering to him the said George W. Helter a true copy of the petition and writ. All done on the 15th day of November, A. D. 1914. I further certify that the defendant, George W. Helter, is a nonresident of this State, and that at the time of the service aforesaid was about leaving the County and the State."

At the return term of the writ, to-wit, on December 15, 1914, an interlocutory judgment by default was entered against defendant. Thereafter, and prior to the entry of final judgment, the defendant, limiting his appearance for that purpose only, moved the court to set aside the default and grant him a reasonable time in which to plead. This motion the court overruled. Thereafter, at the same term, the court entered final judgment in favor of plaintiff for the full sum prayed for in his petition. After unavailing motions for a new trial and in arrest, the defendant prosecuted his appeal to this court.

In the view which we take of the case, as it reaches us, it is unnecessary to look farther than the return of the sheriff, which is assailed as being insufficient to vest the court with jurisdiction to render personal judgment against the defendant. As appears by the return, the service was had on Sunday, and the officer serving the writ has undertaken to bring the service within the provision of section 1785, Revised Statutes 1909, which provides that "No person, on Sunday . . . shall serve or execute any writ, process, warrant, order or judgment except in criminal cases, or for a breach of the peace or when the defendant is about leaving the county," etc. The return recites that the defendant is a nonresident. It is argued that the provisions of section 1785, *supra*, authorizing the service of process on Sunday where the defendant "is about leaving the county," applies only to service upon residents of this State. We are not prepared to say that appellant is correct in this contention, but we find it unnecessary to pass judgment upon the matter.

The return is assailed as being wholly insufficient because of the failure of the sheriff to therein state the place where such service was had. Section 1763, Revised Statutes 1909, provides that: "Every officer to whom any writ shall be delivered to be executed shall make return thereof in writing of the *time, place and manner* of such service of such writ, and shall sign his name to such return" (*italics ours*). It will be observed that this writ recites the time and manner of service; but it does not expressly state the place where such service was had. It does not affirmatively show that the writ was served upon the defendant in Pike County, Missouri. It may be that the language employed in the return can properly be said to raise an inference or presumption, if such were allowable when dealing with a return of process, that service was had within the jurisdiction of the officer, viz: Pike County, Missouri. But it has frequently been held that "the return cannot be aided by presumptions or intendments, that nothing can be presumed in favor of the return, or

read into it by intendment; that the return must show on its face that every requisite of the statute has been complied with." [Regent Realty Co. v. Paving Co., 112 Mo. App. 271, l. c. 279, and cases there cited, 86 S. W. 880; Mercantile & Manufacturing Co. v. Insurance Co., 128 Mo. App. 129, 106 S. W. 573.] It has been said that everything may be inferred against an officer's return which its departure from the statutory requirements will warrant. [Madison County Bank v. Suman, 79 Mo. 527; Holtschneider v. Railroad, 107 Mo. App. 381, 81 S. W. 489.]

We regard the return before us as insufficient. The recitals of the return could be true even though service was had upon the defendant in another county or beyond the limits of the State. [Madison County Bank v. Suman, *supra*, l. c. 530.] It is true that this return bears a caption stating the style of the cause and the words "State of Missouri. County of Pike, S. S." Primarily this caption is to be taken as showing the venue of the return and not the place of service. It has been held, however, that in the absence of any contrary recital in the body of the return, such a caption may afford a sufficient showing that the service was made in the county and State therein mentioned. [Davis v. Richmond, 35 Vt. 419.] But in view of the fact that our statute specifically commands that the officer state in his return the place of service, we think that it would not be proper to hold that this return, failing as it does to comply with the statute, is to be aided by presumption or intendment appearing from the caption prefixed thereto. The return shows defendant to be a nonresident of the State. It is essential, of course, that service be had upon him within the limits of this State in order to confer jurisdiction over his person; and the statute in explicit terms requires that the officer recite in his return the place of such service, in order that it may affirmatively appear that such service was had. The return avoids all reference to the place of service.

In *Crowley v. Wallace*, 12 Mo. 142, l. c. 147, it was held that the failure of a constable to state in his return that the writ was served in the township, did not vitiate all of the proceedings based thereupon so that they could be pronounced void; but, as stated in the opinion, this was upon collateral attack and there was no statute prescribing the form of the return.

The recitals of the return cannot be aided or enlarged by extrinsic evidence (*Madison County Bank v. Suman*, supra; *Realty Co. v. Paving Co.*, supra); but upon proper application the trial court may allow an amendment of the return (See *Mercantile & Manufacturing Co. v. Insurance Co.*, supra).

It is unnecessary to discuss the other features of the case. The judgment will be reversed and the cause remanded with leave to plaintiff to apply to the circuit court for an amendment of the return, if so advised; defendant to have leave to plead to the petition, if the return shall be so amended as to comply with the statute. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

ISADORE MANDLE, Appellant, v. ERNEST E. HORSPOOL and PEARL HORSPOOL, His Wife, SENECA C. TAYLOR, UNION TRUST COMPANY (a Corporation), TITLE GUARANTY TRUST COMPANY (a Corporation), HENRY BELDING, and LUCINDA MILES, Respondents.

St. Louis Court of Appeals. Opinion Filed March 5, 1918.

1. **MORTGAGES AND DEEDS OF TRUST: Note not Executed: Recital of Debt: Validity.** Where, to secure an extension of time for a debt due, a deed of trust was executed, reciting that it was given to secure a debt purporting to be evidenced by a note, the deed of trust is valid, though the note was never executed, and the amount specified was considerably in excess of the debt for which the extension was sought, and a deed of trust reciting that a debt exists, is valid, independent of the note it purports to secure, as the amount of the debt may be established by parol.

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2. ———: **Contracts: Consideration: Extension of Time: Debt of Third Person.** A promise to grant a debtor an extension of time though indefinite, if a reasonable time be given, is a promise on a consideration, and will support an agreement by third persons to secure the debt by executing a deed of trust.

Appeal from the Circuit Court of St. Louis County.—
Hon. G. A. Wurdeman, Judge.

REVERSED AND REMANDED.

Isidore Landauer and Henry H. Furth for appellants.

(1) A mortgage or deed of trust is valid though the note or bond which it purports to secure has no existence, or was not delivered, provided that the debt exists. 4 Kent's Commentaries, 145; *Graham v. Stevens*, 34 Vt. 166; 80 Am. Digest, 675; *Carnall v. Duvall*, 22 Ark. 136; *Lee v. Fletcher*, 46 Minn. 49; *Nazro v. Ware*, 38 Minn. 443; *Volmer v. Stagerman*, 25 Minn., 234; *Eacho v. Crosby*, 26 Grat. 172; *Hodgdon v. Shannon*, 44 N. H. 572; *Ogden v. Ogden*, 160 Ill. 543, 54 N. E. 750; *Goodhue v. Berrien*, 2 Sanf. Ch. 630; *McFadden v. State*, 82 Ind. 558; *Field v. Brokaw*, 148 Ill. 654, 37 N. E. 80; *Moses v. Hatfield*, 27 S. C. 324, 3 S. E. 538; *Smith v. Smith*, 27 S. C. 166, 3 S. E. 78; *Phyler v. Elliott*, 19 S. C. 257; *Mitchell v. Burnham*, 44 Me. 286; *Burger v. Hughes*, 5 Hun, 180, 63 N. Y. 629; *Porter v. Smith*, 13 Vt. 492.

(2) (a) It is not essential to the validity of the mortgage or deed of trust that the debt which it secures be correctly designated. (b) Extraneous evidence is admissible to identify the debt intended to be secured by a mortgage. (c) If the amount of the debt is less than the amount stated in the mortgage, the mortgagor is chargeable only with the amount actually owing. (d) The recitals of the instrument are sufficient evidence of the existence of the debt. *Stevens v. Hampton*, 46 Mo. 404; *Scott v. Bailey*, 23 Mo. 140; *Shirras v. Craig*, 7 Cranch 34; *Williams v. Moniteau National Bank*, 72 Mo. 292; *Schierl v. Newberg*, 102 Wis. 552;

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Bennett v. Wright, 135 N. Y. 543; Martin v. Nixon, 92 Mo. 26; Morrison v. Knight, 130 Ga. 400, 60 S. E. 255; Trustees of Mut. Loan Assn. v. Tyre, 81 Atlantic 48; Lee v. Fletcher, *supra*; Eacho v. Crosby, *supra*; Goodhue v. Berrien, *supra*; Gordon v. Preston, 1 Watts 385, 26 Am. Decisions, 75; Nazro v. Ware, *supra*; Burger v. Hughes, *supra*; Perkins & Manning Co. v. Drew & Landrum's Assigner, 122 S. W. 526; Shoemaker v. Smith, 80 Iowa, 655. Harwood v. Toms, 130 Mo. 225. (3) (a) An extension of time, though without agreement and for an indefinite time, is a sufficient consideration to bind secondary obligors if a reasonable time is in fact given. Powers v. Woolfolk, 132 Mo. App. 354; Hill v. Railroad, 82 Mo. App. 188; Marks v. Bank, 8 Mo. 377; Crears v. Hunter, L. R. 19, Q. B. D. 341; Alliance Bank v. Broome, 2 Drewry & Smale, 289; Perkins v. Trinity R. Co., 61 Atlantic 167, 69 N. J. Eq. 723; First Nat. Bank v. Davis, 146 Ill. App. 462; Muir v. Greene, 100 N. Y. Sup. 722; Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 65; In re All Star Feature Co. ex parte Willot Film Co., 232 Fed. 1004. (b) Detriment to the mortgagee is a sufficient consideration for the mortgage. Hill v. Railroad, *supra*. (c) It is enough if there was any consideration. First Nat. Bank v. Keller, 111 N. Y. Sup. 729, 127 App. Div. 435. (4) One who purchases expressly subject to an encumbrance acquires only the equity of redemption of the grantor. Landau v. Cottrill, 159 Mo. 308; Walker v. Goodsell, 54 Mo. App. 635; Young v. Evans-Snyder-Buel Com. Co., 158 Mo. 395.

Sam D. Hodgdon and S. C. Taylor for respondent.

BECKER, J.—This is an appeal from a judgment on demurrer, dismissing plaintiff's petition on the ground that it states no cause of action.

Plaintiff's second amended petition alleges that on March 1, 1912, the Star Tile & Mantel Company, a corporation, was indebted to plaintiff's assignor, on open account, in the sum of \$1317.16, which was then due

and payable. That defendants, Ernest E. and Pearl Horspool, about April 26, 1912, in consideration of an extension of time for the payment of said indebtedness, which was agreed to be granted by plaintiff's assignor to the debtor, promised and agreed to and with plaintiff's assignor to execute and deliver to the latter a deed of trust on certain real estate in St. Louis County, Missouri, described in the petition, as security for the payment of said indebtedness.

That in pursuance of said promise, the defendants, Horspool, executed and delivered to plaintiff's assignor a deed of trust on said real estate delivered in fact as security for the indebtedness of said Star Tile & Mantel Company, but reciting on its face that it was given to secure a debt of \$3000, purporting to be evidenced by a principal note of defendants, Horspool, for \$3000, due in three years, and six semi-annual interest notes for the interest to accrue for said period, which said deed of trust was duly recorded in the office of the Recorder of Deeds for St. Louis County, Missouri, in Book 295, at page 239.

That in consideration of the premises, plaintiff's assignor extended the time for the payment of said indebtedness for more than six months. That in the meantime the Star Tile & Mantel Company made various payments to plaintiff's assignor, amounting to \$220.78.

That on October 29, 1912, the Star Tile & Mantel Company was adjudged a bankrupt, and plaintiff's assignor presented his claim and received dividends thereon, amounting to \$190.25. That the balance due and unpaid, after crediting all payments of dividends, is \$906.13.

That although the deed of trust was duly executed and delivered to plaintiff's assignor, yet the notes described in the deed of trust, and which it purported to secure, were not delivered to plaintiff's assignor, and defendants, Horspool, have since refused to deliver said notes.

That after the execution of the deed of trust, defendants, Horspool, conveyed the property to defend-

ant, Miles, by a deed expressly providing that the conveyance was subject to the deed of trust in suit.

That before the institution of this suit the plaintiff acquired by assignment the interest of his assignor in the debt and cause of action. The interests of the defendants other than Horspool and Miles are those of lienors of the property.

The petition prays for the foreclosure of the deed of trust. Each of the defendants filed a demurrer to the said second amended petition of plaintiff, the grounds for such demurrers being identical, namely that the said petition does not state facts sufficient to constitute a cause of action. The demurrers were sustained, and, plaintiff refusing to plead further, the trial court rendered final judgment in said cause, dismissing plaintiff's bill. Whereupon plaintiff brings this appeal.

Defendants below, respondents here, have not filed any briefs in the case and as the learned trial judge did not hand down any memorandum stating the specific defects in the petition for which he held the petition demurrable, we have nothing before us to point out wherein the said petition is held to fall short of stating a cause of action.

After a careful reading of the petition we believe the controlling question in the case is whether the petition on its face shows a valid security, in view of the fact that it appears therein that the notes described in the deed of trust in question, and which notes the deed of trust recites it is executed to secure, were never in fact delivered to plaintiff's assignor, mortgagee in said deed of trust.

While we have not found a case in our State in which this point has been directly decided, it has been held that it is not required that a mortgage shall set forth a literal copy of the instrument secured thereby, but that it is sufficient to describe it according to its legal effect. That if it is stated in the conditions of the mortgage "that the grantor was indebted to the grantee for money loaned and his liability on diverse bills of exchange and promissory notes, and it provided

that if he discharged them in six months the deed should be void," it was a sufficient description of the debts *since it was capable of being made certain by parol evidence*. [Aull v. Lee et al., 61 Mo. l. c. 165, and cases cited. See, also, Williams v. Bank, 72 Mo. l. c. 295.] And in Stevens v. Hampton et al., 46 Mo. l. c. 410, a second trust deed, being the one under which defendant purchased, which purported to be given to secure a promissory note due the beneficiary, whereas the evidence showed that it was given to indemnify him as security upon a note to a third person, and the proceeds of the sale were applied in the payment of such note, yet such mortgage was held valid on the ground that courts uniformly sustain bona-fide mortgages notwithstanding the debt may have been incorrectly set out in the conditions; and parol evidence held admissible to explain the consideration.

We are of the opinion, and so hold, that no other written evidence of a debt than that furnished by the instrument itself is necessary to sustain a mortgage. [19 R. C. L., 295; 4 Kent's Commentaries, 1, 145; Jones, Mortgages, sec. 353; Graham v. Stevens, 34 Vt. 167; Lee v. Fletcher, 46 Minn. 49.]

We hold the deed of trust as alleged is valid even without any note or bond, although it purports to secure a note and substantially describes it, and this for the reason that the deed of trust recites that a debt in fact exists independently of the note. If it is made to appear that a debt does exist it is not essential that there should be any evidence of it beyond that furnished by the recitals in the deed. "The true state of the indebtedness need not be disclosed by the instrument itself, but, in cases free from fraud, may be shown by parol. In such cases the validity of the mortgage is not affected by the fact that it was given for a larger sum than that actually due, or that its condition misrepresents the obligation or liability in fact secured or intended to be secured." [Lee v. Fletcher, supra; Nazro v. Ware, 38 Minn. 443; Field v. Brokow, 148

Ill. 654; *Graham v. Stevens*, supra; *Hogdon v. Shannon*, 44 N. H. 572.]

As to consideration, "a promise of forbearance though for an indefinite time, if a reasonable time be given, is a promise on a consideration and binds secondary or additional obligors." [*Powers v. Woolfolk*, 132 Mo. App. 354, l. c. 360, 111 S. W. 1187, and cases there cited.] And therefore plaintiff's petition is sufficient in this respect.

We have carefully examined plaintiff's second amended petition and find that it states a cause of action. The judgment of the trial court herein is accordingly reversed and the cause remanded. *Reynold, P. J.*, and *Allen, J.*, concur.

ROBERT BIDWELL, Respondent, v. C. N. GRUBB,
Appellant.

St. Louis Court of Appeals. Argued and Submitted February 7, 1918.
Opinion Filed March 5, 1918.

1. **MASTER AND SERVANT: Safe Place to Work: Changing Conditions Caused by Progress of Work.** Where a contractor's carpenter, on a building where brickwork was done by another contractor, was injured by giving way of wall erected by such other, the rule relieving the master from liability for unsafe place to work, where a building is in course of erection and conditions are constantly shifting, did not apply, where the brickwork in the wall had been laid on Friday, and the accident happened the following Monday, and where the only change in conditions was that caused by the progress of the carpenter's work.
2. ———: ———: **Changing Conditions Caused by Directions of Foreman.** Nor does this rule apply where the change in conditions is that caused by directions of the foreman changing the servant's manner of work, in consequence of which the servant is doing his work in the manner directed, which resulted in accident to him.
3. ———: ———: **Condition Created by Another Contractor.** Where carpenter on a building was injured by giving way of a brick wall erected by another contractor, his employer was liable, if by reasonable care he could have discovered the dangerous condition of the wall.

4. ———: ———: Evidence of Possibility of Discovering Defects. In action against his employer by carpenter, injured by giving way of brick wall erected by another contractor on building on which he was working, evidence held sufficient to show that ordinary careful inspection by his employer would have revealed defective condition of the wall.

Appeal from the Circuit Court of St. Louis County.—
Hon. Gustavus A. Wurdeman, Judge.

AFFIRMED.

Holland, Rutlege & Lashly for appellant.

(1) The obligation of the master to furnish a reasonably safe place does not apply where the servant is upon premises that are under the exclusive control of a third party. *Powell v. Walker*, 185 S. W. 532; *Troth v. Norcross*, 111 Mo. 634; 26 Cyc., p. 1,109; *Channon v. Sanford Co.*, 70 Con. 573; *Hughes v. Gas Co.*, 168 Mass. 395; *American Bridge Co. v. Bainum*, Fed. Rep. 367; *Robinson v. Railroad*, 88 Vt. 129; *Hallon v. Sprague Elevator Co.*, 37 N. Y. Sup. 175. (2) The obligation of a master to furnish a reasonably safe place does not apply where a building is in course of erection and conditions are constantly shifting. *Armour v. Hahn*, 111 U. S. 311; *Meehan v. Railroad*, 114 Mo. App. 396; *Holloran v. Union Iron & Foundry Co.*, 133 Mo. 470. (3) It is incumbent upon the servant to establish that the danger of which he complains was known to the master, or, by the exercise of ordinary care, would have been known to him; and that the said danger could reasonably have been anticipated by the master. *Brewing Assn. v. Talbot*, 141 Mo. 674; *Goodrich v. Railroad*, 152 Mo. 222; *Meifert v. Union Sand Co.*, 124 Mo. App. 491. (4) It was incumbent upon plaintiff to show that it was necessary for him to use the brick wall in question in order to do his work. This he failed to do. (5) The court erred in giving instruction number 1 at the instance of plaintiff. Said instruction is erroneous for the following reasons: (a) It requires a finding from

the jury that it was necessary for plaintiff to stand or rest on the top of the brick wall in question, when there was no testimony to that effect. It is erroneous to predicate a finding upon matters in reference to which there is no testimony. *Stone v. Hunt*, 114 Mo. 166; *State v. Hope*, 102 Mo. 110; *Evans v. Interstate Co.*, 106 Mo. 50; *State v. Brown*, 145 Mo. 680; *Wilkerson v. Eilers*, 114 Mo. 245. (b) Because it requires a finding that defendant's foreman knew, or, by the exercise of ordinary care, ought to have known of the danger of the bricks in question giving way. There was no evidence upon which to base such a finding. See authorities cited under heading 3, *supra*. (c) Said instruction is erroneous because it ignores the testimony to the effect that the brick wall in question was under the control of the brick contractor and not under the control of the defendant. See authorities cited under heading 1, *supra*. (d) Said instruction is erroneous because it ignores the fact that the plaintiff at the time of his accident was working on a building in the course of construction, amid shifting conditions. See authorities cited under heading 2, *supra*. (6) The court erred in giving instruction number 2 at the instance of plaintiff. Said instruction is erroneous for the following reasons: (a) Because it requires a finding that it was necessary for plaintiff on the occasion in question to step or rest on the top of a brick wall. It is erroneous to predicate a finding where there is no testimony upon which to base it. See authorities cited under heading 5 (a) *supra*. (b) Said instruction is erroneous because it requires a finding that the brick wall at the place in question was loose and insecure, and defendant's foreman knew, or by the exercise of ordinary care would have known of its said condition. See authorities cited under heading 3, *supra*. (c) Said instruction is further erroneous because it disregards the testimony to the effect that the brick wall in question was erected by the brick contractor and was under his control, and not under the control of the defendant. See authorities

cited under heading 1, supra. (d) Said instruction is further erroneous because it ignores the testimony to the effect that the plaintiff was working upon an unfinished building, amid shifting conditions. See authorities cited under heading 2, supra. (7) The court erred in giving instruction number 3 at the instance of plaintiff. Said instruction is erroneous because it requires a finding that it was necessary for plaintiff to rest or step on the brick wall, when there was no testimony upon which to base said finding. See authorities cited under heading 5(a), supra. (8) The court erred in refusing to give instruction B offered by defendant. See authorities cited under heading 1, supra. (9) The court erred in refusing to give instruction C requested by defendant. See authorities cited under heading 1, supra. (10) The court erred in refusing to give instruction E requested by defendant. See authorities cited under heading 3, supra.

Breckinridge Long and Frank A. Thompson for respondent.

(1) It is elementary law that it is the duty of the master to exercise ordinary care to furnish a servant a reasonably safe place in which to work. *Clark v. Iron & Foundry Co.*, 234 Mo. 436, 449; *Dayharsh v. Railroad*, 103 Mo. 569; *Herdler v. Buck's Stove Company*, 136 Mo. 16; *Doyle v. Trust Co.*, 140 Mo. 10; *Burkard v. Rope Company*, 217 Mo. 481; *Bennett v. Lime Co.*, 146 Mo. App. 573; *Morgan v. Railroad*, 136 Mo. App. 342. A. "The greater the hazard the greater the care." *Woods v. Wabash R. R. Co.*, 188 Mo. 229. (2) It is equally academic that this duty of the master was imposed upon his vice-principal, Tom Reed, the foreman in charge of the work, and whose orders respondent was obeying in doing the sawing as he was doing it, and his orders to do the sawing as directed were assurance that the wall was reasonably safe for that purpose. *Sullivan v. Railroad*, 107 Mo. 66; *Bane v. Irwin*, 172 Mo. 317; *Baxter v. Lumber Company*, 186 Mo. App. 361; *Clark v. Iron & Fdy. Co.*, 234 Mo. 436;

Morgan v. Railroad, 136 Mo. App. 342; Shortel v. City of St. Joseph, 104 Mo. 120; Bradley v. Railroad, 138 Mo. 306; Bennett v. Lime Co., 146 Mo. App. 575. (3) The duty of the master to exercise ordinary care to furnish the servant a reasonably safe place in which to work applies even though the premises where the servant is required to work are not owned by the master or under his authority or control. Clark v. Iron & Foundry Co., 234 Mo. 436, 451; Near v. St. Louis & San Francisco Railroad Company, 261 Mo. 80. (4) The duty on the part of the master to exercise reasonable and ordinary care applies particularly in this case, and the conditions are not constantly shifted in the erection of a building so as to relieve the master of this primary duty. Rowden v. Mining Co., 136 Mo. App. 387. (5) There was testimony that the defendant knew, or by the exercise of ordinary care, under the circumstances, could have known, that the mortar on the brick wall was defective. (6) In answer to point 4 of appellant's brief we contend that there was positive evidence to the effect that it was necessary for plaintiff to stand on the brick wall to do the sawing. (7) In answer to point 5 made in appellant's brief, we contend that there was abundant testimony to the effect that it was necessary for plaintiff to stand on the wall to do the sawing in the manner in which he was directed to do the sawing. There was also evidence that the brick wall was loose and insecure and that the mortar had no adhesive part to it, which was discovered upon a slight examination, by defendant, immediately after the accident. A minute examination of it, which we think ordinary care called for, under the circumstances, undoubtedly would have disclosed it before the accident. Woods v. Wabash R. R. Co., 188 Mo. 229.

REYNOLDS, P. J.—Action by plaintiff for damages for injuries sustained by the giving away of a wall on which plaintiff was partly resting while engaged in laying a subfloor on a building, the outer walls of which had reached to the third story, the top about

forty feet from the ground. Plaintiff's employer, the defendant, was the contractor for doing the carpenter work in connection with the erection of an addition to Lindenwood College in St. Charles. The general contractor for the work was the Westlake Construction Company and one Reinschmidt was contractor for erecting the walls. Plaintiff, who was an experienced carpenter, had been working on the building some six weeks or more at the time of the accident. As the work progressed on the building it was necessary for the carpenters to lay joists, these joists resting on the brick walls. The building in question ran east and west, the front to the east. Its width was from north to south. The joists ran north and south parallel to each other and about sixteen inches apart and were inserted in the north and south walls. At the time of the accident to plaintiff the joists for the third floor were in position, and plaintiff and other carpenters were engaged in laying a subfloor on them. This subfloor started at the southeast corner of the building and the boards composing it were laid diagonally, one end resting on the west wall, the other on the south wall. The planks of this subfloor were six inches wide. It was necessary to saw off the south end of each plank at right angles in laying them. At the time in question about fifteen of these boards in this subfloor had been laid, covering about ten feet of the joists from the corner. The usual way of laying these boards, it seems, was to nail them down, then mark off a line just inside the wall and saw off the ends. That was the way plaintiff had been doing the work, when the foreman of the job, who was immediately over plaintiff, came up to him and told him that he should saw the boards as he went along, where he was leaving them to just stick over the wall. To quote the exact language of the foreman, as testified to by plaintiff, the foreman told him not to lay the boards in the way he was doing it, but to go ahead and saw off each board as he went. Plaintiff testified that before that he had been leaving them stick over the wall and after a section of them

was laid he would then saw them off, but the foreman changed this by directing him to saw each board as he went along.

A witness for plaintiff, who was assisting plaintiff in the work, testified to practically the same thing, that is, that the foreman came around and told them to saw the boards as they went along, and after that they sawed one board at a time, holding it up and sawing it. This witness further testified that the usual way they had worked before the foreman had given them this direction, was to run it over and cut it after it was laid, standing on the top of the floor and cutting it; that doing it the way the foreman directed, however, plaintiff being right-handed, was obliged to rest his left foot or leg on the wall, kneeling with his right knee on the boards in place, as we understand it. It is very difficult to understand from the testimony whether plaintiff, when he was sawing off this board, had nailed it, or whether it was loose, but in the view we take of it we do not think that that is very material. The material fact in the case is, that the evidence on the part of plaintiff tends to show that in order to saw the board in the manner directed by the foreman, it was necessary for him to place one foot on the top of the wall so that his weight rested partly on that and partly on the knee of his right leg, which it appears was on the flooring. As to that the evidence is not very clear. At any rate, while the plaintiff was so engaged the top of the wall gave way, and he was precipitated to the ground, receiving the injuries of which he complains and on account of which he brought this action.

There are two acts of negligence charged in the petition in the following language:

"1. The defendant negligently failed to furnish and provide the plaintiff with a suitable, proper and safe place in which to work, in that said place where plaintiff was sent to do the said work, as aforesaid, was not a suitable, safe and proper place in which to carry on the work of sawing the boards as aforesaid,

inasmuch as the brick wall on which it was necessary, as aforesaid, for plaintiff to stand or kneel or rest was loose and unsafe, which the defendant knew, or by the exercise of ordinary care and diligence, could have known.

"2. Plaintiff further states that said place where he was ordered to work by defendant was dangerous, to the safety of plaintiff, by reason of the fact that plaintiff while in the exercise of ordinary care for his own safety, in doing said work, *as directed by the defendant*, was likely to fall from said wall, a great distance to the ground and to be injured by losing his balance on said wall, or slipping therefrom, or by the bricks on top of said wall turning under the weight of plaintiff's body; that defendant either knew or by the exercise of ordinary care ought to have known, of the dangers of said place in which he had ordered said plaintiff to do said work, as aforesaid. Plaintiff further states that his fall from said wall to the ground, and his subsequent injuries, were directly caused by the carelessness and negligence of the defendant in ordering the plaintiff to do said work in said dangerous place, as aforesaid." (Italics ours.)

At the conclusion of the testimony defendant offered an instruction in the nature of a demurrer, which was refused, defendant excepting. At the instance of plaintiff the court gave five instructions and gave a number at the instance of defendant. It refused four asked by defendant and of its own motion gave the usual instruction as to the number of jurors necessary to concur in a verdict.

The jury returned a verdict in favor of plaintiff for \$3500, judgment following. Defendant, filing a motion for new trial, excepted to its being overruled and has duly appealed.

There were no formal assignments of error made by learned counsel for appellant but they have made and argued ten points.

The first and second are to the effect that the obligation of the employer to furnish a reasonably safe

place, does not apply where the employee is upon premises that are under the exclusive control of a third party, and that the obligation of the employer to furnish a reasonably safe place, does not apply where a building is in course of erection and conditions are constantly shifting. Taking up the last proposition first, while that is good law, it is not applicable here, for there is no evidence that the conditions were constantly shifting while this work was going on. The brick-work in the wall had been laid on Friday; the accident happened on the following Monday, so there was no change in the condition of the wall. If it is meant by this proposition that the conditions were changed by the fact that laying the several planks on this subfloor, that is not such a change in condition as is contemplated by the authorities cited and referred to. If it is meant by this that these were changed by the directions which the foreman gave, the answer is that it was in consequence of that order that the plaintiff was doing the work in the manner which resulted in the accident.

As to the first proposition, our court had very much the same contention made before it in *Greenstein v. Christopher & Simpson Architectural Iron & Foundry Co.*, 178 S. W. 1179, not to be officially reported. That was an action against the defendant for injury to a painter, who had been employed by the defendant to paint some girders. It was in evidence that one of these girders had not been set properly by the bricklayers, who had the contract for the doing of the brick-work, and that in consequence thereof it had turned and thrown plaintiff, to his injury. We there held that the fact that defendant had nothing to do with the brick-work and that the ends of beams were to be bricked in after the contractor had placed them in position, could not relieve the defendant of its duty to exercise ordinary care to make the place reasonably safe for its employee engaged in painting such beams, as it was bound to use reasonable care to discover the dangerous condition of the beams, if any.

In *Clark v. Union Iron & Foundry Co.*, 234 Mo. 436, 137 S. W. 577, our Supreme Court held it was the duty of the employer to inspect the premises about which his workmen were engaged under his direction and ascertain whether or not there were any dangerous agencies connected with or about the place where plaintiff was required to work that would render it unsafe. This duty to inspect for secret and hidden dangers rested upon the employer, and he is not absolved from liability to the workmen by the mere fact that the dangers were hidden and he knew nothing about them and they were not of his making, and that while it is the duty of the owner of the premises to notify the contractor employed to repair them, of hidden dangers, the contractor is not absolved from his duty to his workmen to inspect and notify him of such hidden dangers by the owner's failure to notify the contractor.

These decisions determine the first and second points made by learned counsel for appellant adversely to their contention.

The third point made by learned counsel for appellant is that it was incumbent upon the plaintiff to establish that the danger which he complains of was known to the employer, or by the exercise of ordinary care would have been known to him, and that the danger could reasonably have been anticipated by the employer.

The evidence in this case shows that even a casual inspection by the defendant of this wall which fell, would have demonstrated that it was not properly laid and was unsafe. A witness for plaintiff, who was working with him at the time, testified that immediately after the accident to plaintiff, the defendant came to the witness and asked him if he knew why or how it happened that plaintiff fell. Witness told him he did not and defendant said to him, "There may be gravel under this brick," and he called the witness over and together they examined the mortar where three or four bricks had fallen out, but found no gravel in it "Just crumbled it up in our fingers, and it was nothing much

more than sand," said the witness; could not find any gravel on top of the brick. The mortar was lime mortar. Said this witness, "You could pick it up in your fingers and crumble it up as you would that much sand. There was very little adhesive part to it than there would have been in the pure sand." This is certainly evidence sufficient to show that even the most casual examination would have developed the fact that the mortar with which these bricks were laid in this wall was not of the proper quality to make the wall safe. We therefore hold this third point made by learned counsel for appellant untenable.

The fourth proposition made by those learned counsel is, that it was incumbent upon the plaintiff to show that it was necessary for him to use the brick wall in question in order to do his work, and it is claimed that he had failed to do this. In connection with this same claim are the fifth, sixth and seventh points, which attack the first, second and third instructions given at the instance of plaintiff. The gravamen of the attack on the instructions is, that they required a finding by the jury that it was necessary for the plaintiff to rest or step on the brick wall in doing the work in which he was engaged, when there was no evidence to support this. We cannot agree to this. There was very substantial evidence to the effect that to carry out the instructions of the foreman as to the manner in which he should do this work, that is saw off the ends of the boards as laid or as being laid, and considering the situation, that it was necessary for plaintiff to rest his foot on this wall, and that to do the work as required by the foreman in any other way, would have involved the consumption of more time, or would have required plaintiff to place himself in such an awkward position that it would have been almost impracticable for him to have done the work. Learned counsel for appellant lose sight of the fact that in the second ground of negligence alleged, it is charged that "by reason of the fact that plaintiff while in the exercise of ordinary care for his own safe-

ty, in doing said work, as directed by the defendant, was likely to fall from said wall, a great distance to the ground," etc. Both in their argument and in their quotation of this second ground of negligence these counsel have inadvertently overlooked the above words which we have italicized in the second assignment of negligence, namely, that plaintiff was doing the work in the manner directed by the defendant. There was very substantial evidence that in doing it, as so directed, it was necessary for him to brace himself against this wall with one leg. We therefore hold that this point is not tenable.

It is further argued as against the correctness of the first instruction, that it requires the finding that the defendant's foreman, by the exercise of ordinary care ought to have known of the danger of the bricks in question giving way. This, it is argued, was erroneous because there was no evidence, it is claimed, upon which to base such finding. We have disposed of this contention above.

It is further argued against this instruction that it ignores the fact that the plaintiff, at the time of his accident, was working on a building in the course of construction, amid shifting conditions. This, we have also disposed of adversely to the claim of learned counsel.

The other points urged against the first and second instructions have been disposed of by what we have said before.

The eighth and ninth propositions or points made are to the refusal of the court to give three instructions asked by the defendant. The points sought to be covered by the first and second of these instructions are, that they asked the court to instruct the jury that if they believed and found from the evidence that the brick wall mentioned in the evidence was not designed or erected by the defendant, but was designed by the owner of the premises and erected by a brick contractor, and if they further believe and find from the evidence that the brick wall was not in possession

or control of the defendant then and in that case plaintiff is not entitled to recover and they should find their verdict for the defendant. Another instruction covered this same proposition in different language.

We have disposed of both of these points adversely to the claim of counsel for appellant in what we have said when referring to the point first made.

The third instruction which was refused, and on which refusal error is assigned, is to the effect that there was no evidence in the case that defendant either knew or by the exercise of ordinary care would have known that the brick wall mentioned in the evidence was defective. We have disposed of this adversely to the claim of learned counsel for appellant.

Finding no reversible error the judgment of the circuit court is affirmed. *Allen and Becker, JJ.*, concur.

J. F. HEFERNAN, trading as UNITED STATES SUGAR FEED CO., Respondent, v. KARL NEUMOND, et al., Appellants.

St. Louis Court of Appeals. Opinion Filed February 11, 1918.

1. **CONTRACTS: Mutuality: Acceptance.** A contract is not lacking in mutuality which provides for the sale of a definite quantity of mixed feed, though it does not in explicit words recite that the buyer agrees to purchase and pay for the same, such being implied by the acceptance of the contract by the buyer by signing his name thereto.
2. ———: ———: **Acts of the Parties.** Furthermore, the subsequent acts of the parties and part performance of the contract would suffice to render it mutually binding and enforceable.
3. ———: **Evidence: Customs and Usages: Modification.** Evidence offered by the seller, his mill having been destroyed by fire, with a view of showing the existence of a custom "in the trade" to excuse the manufacturer in such cases, was properly excluded, the contract being absolute upon its face, and containing no provision against such a contingency.

4. ———: **Sales: Nonperformance: Excuse.** The mill having been destroyed by fire, the contract being absolute upon its face, and containing no provision against such a contingency, the seller is not excused thereby from a performance of the contract; it not being a case where the subject-matter of the contract went out of existence, through no fault of the contracting party, rendering the contract incapable of performance.
5. ———: ———: **Actions: Defenses: Illegality.** While it is a good defense to a contract valid on its face that it was intended by the contracting parties to violate the law in performance thereof, a buyer of feed for resale cannot be denied relief on account of the seller's nonperformance, unless it was his intention in disposing of the feed to violate the law.
6. ———: ———: **Violation of Law: Question for Jury.** In an action for damages for breach of contract for the sale of feed, the question whether the buyer who acquired the feed for resale did so with the intention of violating the pure food laws as to branding, held a question for the jury.
7. ———: ———: ———: **Food: Pure Food Laws: Intention.** Though, intention is immaterial in determining whether there was a violation of pure food statute, the intent of a buyer of feed who expected to resell, is material in determining whether the contract of purchase was tainted with illegality.
8. **EVIDENCE: Admissibility: Intent.** Plaintiff, in an action for breach of contract, may, where it is material as to whether he intended to resell the feed purchased in violation of law, testify as to his intent.
9. ———: ———: **Other Transactions.** In an action against the seller's assignees for breach of contract for the sale of feed, where defendants asserted that the contract was unenforceable because the buyer intended to resell the feed in violation of the pure food statutes, evidence of contracts and letters passing between the buyer and the seller, who fulfilled previous contracts, for the purpose of establishing that the buyer in the past had trouble with the agricultural departments, was properly excluded because unconnected with the matter in controversy.
10. ———: ———: **Collateral Issues.** Such evidence was also properly excluded, because it would have raised various separate collateral issues relating to the buyer's conduct in previous years.
11. **INSTRUCTIONS: Damages: Measure of Damages.** In an action for damages for breach of a contract to sell feed which was manufactured according to a special formula and could not be obtained on the open market, it appeared that defendant, when unable to supply plaintiff with the feed, consented that he should purchase feed manufactured with a substitute for one of the

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ingredients which could not be secured, the price being the same as if the original ingredient had been obtained. *Held* that, while ordinarily the measure of a buyer's damages is the difference between the contract price and the market value of the goods, and if the goods have no market value the difference between the contract price and the reasonable value of the goods, plaintiff was entitled to recover as damages the difference between the price of the feed contracted for and the actual cost of the best available substitute, provided it was impossible to procure feed exactly like that contracted for at a lower price than that at which the substitute could be obtained.

12. ———: ———: ———: **Review: Harmless Error.** In such case, as defendant consented to plaintiff's accepting the substitute, an instruction, allowing plaintiff to recover the difference between the actual cost of the best available substitute and the contract price, was harmless to defendant.

Appeal from the Circuit Court of the City of St. Louis.—*Hon. Leo. S. Rassieur*, Judge.

Affirmed.

Greensfelder & Levi for appellants.

(1) (a) The contract sued upon was not admissible in evidence, being without consideration, lacking mutuality and unilateral in form, though signed by both parties. *Campbell v. Handle Co.*, 117 Mo. App. 19; *Cold Blast Transportation Co. v. K. C. Bolt & Nut Co.*, 114 Fed. Rep. 77; *Iron & Rail Co. v. Railroad*, 148 Mo. App. 173; *Rehm-Zeiher Co. v. Walker Co.*, 160 S. W. 777; *Brown Paper Box Co. v. Mercantile Co.*, 190 Mo. App. 584; *Hudson v. Browning* 264 Mo. 58-65; *Hill v. Hunter*, 157 S. W. 247; *Mutual Film Corp. v. Morris & Daniel*, 184 S. W. 1060. (b) Part performance in this case did not make up for want of mutuality in the contract. *Morrow v. Southern Express Co.*, 101 Ga. 810; *American Refrigerator Transfer Co. v. Chilton*, 94 Ill. App. 61; *Savannah Ice Delivery Co. v. American Refrigerator Transit Co.*, 110 Ga. 142; *Gray v. Hinton*, 7 Fed. 81. (2) Defendants' peremptory instruction should have been given for the following reasons: (a) Plaintiff having aided in and insisted upon an illegal

method in the performance and execution of the agreement sued upon cannot compel enforcement of the contract at this time: *Materne v. Horwitz*, 101 N. Y. 469; *Cavan v. Milburn, L. R.*, 2 Ex. 230; *Gaylord v. Soragen*, 32 Vt. 110; *Aiken v. Blaisdell*, 41 Vt. 655; *Fisher v. Lord*, 63 N. H. 514; *Fineman v. Sacks*, 33 Kan. 621; *Bancher v. Mansel*, 47 Me. 58; *Church v. Proctor*, 66 Fed. 240; (b) There being an admitted violation of a positive statute plaintiff cannot recover on account of breach of contract. *Hagerty v. St. Louis Ice Mfg. & Stor. Co.*, 143 Mo. 238; *St. Louis Fair Ass'n v. Carmody*, 151 Mo. 566; *Curran v. Downs*, 3 Mo. App. 468; *Buckingham v. Fitch*, 18 Mo. App. 91; *Rice Bros. & Nixon v. National Bank of Commerce*, 98 Mo. App. 696; *Tandy v. Commission Co.*, 113 Mo. App. 409; *In re Canfield*, 190 Fed. 266; *Genessee Valley Milk Products Co. v. Jones Corp.*, 124 N. Y. Sup. 1009; 2 *Elliott on Contracts*, secs. 648 and 656; *Small & Co. v. Commonwealth*, 134 Ky. 272; *Williston on Sales*, sec. 675, p. 1142; *Cowan v. Milburn, L. R.* 2 Ex. 230. (c) The question of intent is not material in violating pure food statutes. *State v. Griffith*, 67 Mo. 287; *Beckham v. Nacke*, 56 Mo. 546; *State v. Bruder*, 35 Mo. 475, 1 Cyc. 943; 1 *Amer. & Eng. Enc. of Law*, 744, 12 Cyc. 148; 8 *Amer. & Eng. Enc. of Law*, 201; *Mullen v. State*, 82 Ala. 42; *State v. Zichfeld*, 34 L. R. A. 784; *State v. Southern Ry. Co.*, 41 L. R. A. 246; *State v. Scoggins*, 10 L. R. A. 542; *State v. McLean*, 121 N. C. 589, 42 L. R. A. 721; *State v. Edwards*, 69 L. R. A. 667; *People v. Roby*, 52 Mich. 577; *Jaycox v. U. S.*, 107 Fed. 938; *People v. Laesser*, 79 N. Y. Sup. 470; *People v. Kibler*, 106 N. Y. 321; *U. S. v. Bayaud*, 16 Fed. 376; *Todd v. Ferguson*, 161 Mo. App. 624. (d) Where an act forbidden by law is intentionally done the criminal intent is thereby consummated. *State v. Silva*, 130 Mo. 464; *State v. Johns*, 124 Mo. 385; *State v. Gregory*, 170 Mo. 606; *State v. Nocton*, 121 Mo. 554; *State v. Beard*, 126 Mo. 554; *Inhabitants of Salem v. Inhabitants of Lynn*, 13 Metcalf, 545; *Haynes v. Rutter*, 24 Pick, 242; *Toal v. City of N. Y.*, 69 N. Y. Sup. 454; *Gale v. Insurance*

Co., 41 N. H. 170; Ballard v. Lockwood, 1 Daly, 164; Harris & Mitchell v. Amoskeag Lumber Co., 97 Ga. 469; Palmer v. Pinkham, 33 Me. 34; Burlingame v. Rowland, 77 Cal. 317; Hunds v. Keith, 57 Fed. 1013; Cone-maugh Bwg. Co. v. Bennett, 60 Pa. Sup. Ct. 543; Blandi v. Pelligrini, 60 Pa. Sup. Ct. 552. (e) If plaintiff cannot establish his case otherwise than through the medium of an illegal transaction to which he himself was a party the contract will be held illegal. 2 Elliott on Contracts, sec. 678, p. 33; Harrison v. McCluney, 32 Mo. App. 481-487; Tyler v. Larimore, 19 Mo. App. 445, 454; Kitchen v. Greenabaum, 61 Mo. 110, 114; Bick v. Seal, 45 Mo. App. 475, 477; Friend v. Porter, 50 Mo. App. 89, 92; Sumner v. Sumner, 54 Mo. 340, 346; Cherokee Strip Live Stock Ass'n v. Cass Land & Cattle Co., 138 Mo. 394, 406; Pendleton v. Asbury, 104 Mo. App. 723. (3) Whether a contract is contrary to public policy is a question of law to be determined from the circumstances of the case. Spangenberg v. Spangenberg, 126 Pac. 382; Weber v. Shay, 56 Ohio St. 116; Detroit Salt Co. v. National Salt Co., 134 Mich. 121; Kuhn v. Buhl, 251 Pa. St. 370, 9 Cyc. 483. (4) The court erred in permitting plaintiff to testify as to his future intention, as same was in the form of a self-serving statement. Plaintiff's intentions were all expressed in correspondence and the court should have directed the jury that as a matter of law that if intent was a material feature of the controversy, that the letters were sufficient to establish intent upon the part of the plaintiff to violate the law. Lumber Co. v. Railroad, 243 Mo. 244; Spiva v. Osage Coal & Mining Co., 88 Mo. 75; Powell v. Powell, 23 Mo. 373; State v. F. Lefavre, 53 Mo. 471; Furber v. K. C. Bolt & Nut Co., 185 Mo. 301; Jackson v. Hardin, 83 Mo. 175; Burress v. Blair, 61 Mo. 140; Henry v. St. Louis, Kansas City & Northern Ry. Co., 76 Mo. 293; Pemberton v. Dooley, 43 Mo. App. 177; Ford v. Dyer, 148 Mo. 528; Davies v. Peoples Ry. Co., 159 Mo. 1; Michael v. St. Louis M. F. Ins. Co., 70 Mo. App. 26. (5) Having permitted plaintiff to testify as to his intention, defendants

should have been permitted to prove by the 1909, 1910 and 1911 contracts and correspondence pertaining thereto for the purpose of showing that plaintiff's previous conduct was inconsistent with his intent as to his future conduct then expressed. *Bainbridge v. State*, 30 Ohio State, 274; *People v. Bidleman*, 104 Cal. 613; *Toll v. State of Fla.*, 40 Fla. 172; *People v. McLaughlin*, 37 N. Y. Sup. 1013; *Manheimer v. Harrington*, 20 Mo. App. 301; *Owens v. Railroad*, 120 Mo. App. 327; *Dodge v. Knapp*, 112 Mo. App. 525; *Whitman v. Supreme Lodge Knights and Ladies of Honor*, 130 Mo. 48; *Davis v. Bovies*, 141 Mo. 241; *State v. Spray*, 174 Mo. 578; *State v. Bailey*, 190 Mo. 280; *State v. Spaugh*, 200 Mo. 594; *State v. Wilson*, 223 Mo. 168; *Powell v. Railroad*, 229 Mo. 272; *State v. Hyde*, 234 Mo. 224. (6) The court's instruction on the question of measure of damages did not properly declare the law. Where delivery is required to be made by installments the measure of damages will be estimated by the value at the time delivery should have been made. *Sagola Lumber Co. v. Chi Title & Trust Co.*, 121 Ill. 297; *Mo. Furnace Co. v. Cochran*, 8 Fed. 463; *Hewson-Herzog Supply Co. v. Minn. Brick Co.*, 55 Minn. 534; *Mayne on Damages*, sec. 206; *Brown v. Muller*, 7 Ex. 324; *Henry v. St. Louis, Kansas City & Northern Ry. Co.*, 76 Mo. 288, 293; *Pemberton v. Dooley*, 43 Mo. App. 177; *Ford v. Dyer*, 148 Mo. 540; *Davies v. Peoples Ry. Co.*, 159 Mo. 1; *Michael v. St. Louis M. F. Ins. Co.*, 70 Mo. App. 26. (7) Plaintiff having admitted that there was a market value of the character of feed in controversy, the instruction given as to measure of damages was not correct. The measure of damages, in a case where there is a market value of goods, is the difference between the contract price and the market value of the goods at the time and place when and where by the contract they were to be delivered, if the goods have such a market value, and, where they have no market value, the difference between the contract price and reasonable value of the goods. *Consumers' Glue Co. v. Samuel Bingham's Son*

Mfg. Co., 193 Mo. App. 90. (8) Where evidence inadmissible under the petition was received, defendant is entitled to introduce evidence to controvert same. *Hays v. Metropolitan Street Ry. Co.*, 182 Mo. App. 393; *Blair v. Marks*, 27 Mo. 579; *Bethany Savings Bank v. Cushman*, 66 Mo. App. 102; *Trustees of Christian Univ. v. Hoffman*, 95 Mo. App. 498. (9) Plaintiff was guilty of misbranding and adulterating the feed manufactured in Missouri and used by him in interstate commerce. *United States v. 7 cases Echman's Alternative*, 36 Sup. Ct. 190; *United States v. 40 bbls. and 20 kegs of Coca Cola*, 36 Sup. Ct. 573. (10) It is the court's duty to tell the jury the legal effect of the contents of letters where they are unambiguous. *St. Paul Fire & Marine Insurance Co. v. Garnier*, 196 S. W. 980; *Woldert Grocer Co. v. Pillman*, 176 S. W. 457; *Mount v. Neighbors' Implement & Vehicle Co.*, 189 S. W. 614; *United Brotherhood of Carpenters, etc., v. Luck*, 189 S. W. 1036; *Farmers' Union Merc. Co. v. Pinkerton*, 194 S. W. 709; *Radford and Guise v. Practical Premium Co.*, 188 S. W. 562; *Thompson on Trials*, secs. 1065, 1068. (11) Where, at the execution of a writing an oral stipulation is entered into, or a condition is annexed upon faith of which the writing is executed, parol evidence is admissible, though it materially varies the terms of the contract. *Excelsior Saving Fund & Loan Assn. v. Fox*, 98 Atl. 593; *Ware v. Allen*, 128 U. S. 590, 32 Law Ed. 563; *Bowser & Co. v. Fountain*, 128 Minn. 198, L. R. A. 1916B, 1036; *Beach v. Nevins*, 162 Fed. 129, 18 L. R. A. (N. S.) 288; *Simrall v. Amer. Multigraph Sales Co.*, 158 S. W. 172 Mo. App. 384, 388; *St. Joe Hay & Feed Co. v. Brewster*, 195 S. W. 71. (12) Evidence should not be excluded as irrelevant which would have a tendency, however remote, to establish the probability and improbability of the fact in controversy. *Wood v. Finson*, 91 Me. 280, 284; *Livingston v. Stevens*, 122 Ia. 62, 67; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 29 Law Ed. 997; *Gardner v. Meeker*, 169 Ill. 44; *Slater & Meyers Co.*

v. De Moiest Spoke & Handle Co., 94 Ga. 687; Eames v. Kaiser, 142 U. S. 488, 35 Law Ed. 1091; Davis v. Vories, 141 Mo. 234, 241; Whitmore v. Supreme Lodge Knights & Ladies of Honor, 100 Mo. 36, 48; Smith v. National Benefit Society, 9 L. R. A. 616. The law seems to be that when there is nothing in the agreement to exclude the inference the parties, when engaged in the same business, are always presumed to contract with reference to the usage or custom which prevails in the particular trade or business to which the contract relates, and they will be presumed to have knowledge of such custom; and it is not necessary in such a case to prove actual knowledge, or that the custom is so general or universal that knowledge may be presumed. Eaton v. Coal Mining Co., 161 Mo. 35; Holder v. Swift, 147 S. W. 691; Smith & Co. v. Russell Lumber Co., 82 Conn. 116; Insurance Co. v. Reymershoffer, 56 Tex. 234, 238; Bowles v. Driver, 112 S. W. 440; Heyworth v. Miller Grain Co., 174 Mo. 171. Defendants are not liable to plaintiff under the contract entered into between Goeke & Company and the defendants, because the contract sued upon was entered into prior to June 24, 1912, and defendants' instruction J should have been given.

Abbott & Edwards for respondent.

(1) If the promisee signs and returns a written offer it amounts prima facie to an acceptance. 1 Page on Contracts, page 85; 1 Elliott on Contracts, page 51; Taylor Co. v. Bannerman, 97 N. W. 918; Barker v. Banks, 15 La. 453; Elastic Tip Co. v. Graham, 53 N. E. 315; 9 Cyc., page 260. (2) It frequently happens that contracts on their face, and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. Lewis v. Atlas Mutual Life In-

insurance Co., 61 Mo. 538; 6 Ruling Case Law, page 689; 9 Cyc. 333; *Wise v. Ray*, 3 G. Greene's 430; *Jernigan v. Wimberly*, 1 Ga. (1 Kelly) 220; *Lane & Nearn v. Warren*, 115 S. W. 903; *Laclede Construction Co. v. Tudor Iron Works*, 169 Mo. 137. (3) Not only is the contract sued upon not wanting in mutuality since signed by plaintiff, but it is also not wanting in mutuality because from part performance as well as from the letters that passed between the parties after its execution, an acceptance will be implied. *Laclede Construction Co. v. Tudor Iron Works*, 169 Mo. 137; *Eaton v. The Wear Coal Co.*, 125 Mo. App. 194. *Williams v. Implement Co.*, 198 S. W. 428. (4) Defendants' peremptory instruction offered at the close of the entire case should not have been given. *Church v. Proctor*, 66 Fed. 240. (5) Appellants contend that whether a contract is contrary to public policy is a question of law to be determined from the circumstances of the case, and that this was a question of law as was also the legal effect of the letters that passed between the parties after June 17, 1912. (See defendants' instructions given.) One defined misbranding and the other stated that "then plaintiff cannot recover in this action for such part of the feed contracted for with which it was intended to violate the law." 10 Ruling Case Law, 946. (6) It was proper for plaintiff to state his intention as to future shipments. Furthermore, appellants brought out the testimony on cross-examination. 10 Ruling Case Law, 946; Section 170, *Jones on Evidence*; 23 L. R. A. (N. S.) pages 373-393 and 403; *St. Louis Fair Ass'n. v. Carmody*, 151 Mo. 575; *Buckingham v. Fitch*, 18 Mo. App. 99; *Vansickle v. Brown*, 68 Mo. 634; *The State to Use v. Mason*, 23 Mo. App. 329; *The State v. Palmer*, 88 Mo. 573; *The State v. Williams*, 95 Mo. 249; *State v. Banks*, 73 Mo. 592. (7) To warrant assuming that an actor had the same intention, the acts must be so closely connected in point of time that it is not probable that there has been a change of mind and of such a similar nature that it is not probable that other in-

fluences played upon him to act. The question of time during which other acts may be proven seems to be largely within the trial court's discretion. 10 Ruling Case Law, 939; *State v. Murphy*, 17 L. R. A. (N. S.) 615. This whole matter of intention was developed by defendants. (8) "Ordinarily the measure of damage for breach of contract to furnish an article is the difference between the contract price and the market price of the article at the time and place of delivery. But there are special features involved in this case which renders such rule inapplicable. . . . The evidence shows that there was no open market for this particular article." And it also shows that to obtain the feed only one mill was available. *Gallagher v. Baird*, 54 App. Div. 404; 2 *Sutherland on Damages*, sec. 652; *Wall v. Ice & Cold Storage Co.*, 112 Mo. App. 666. (9) Defendants sought to prove that there is a custom which relieves manufacturers of grain of the obligation to furnish feed when the manufacturer's mill is destroyed by fire, despite the fact that the contract contains no exception to the absolute duty provided therein. This evidence was properly excluded. *Covington v. Kanawha Coal Co.*, 3 L. R. A. (N. S.) page 248; *State v. Public Service Commission*, 189 S. W. 379; *Renick v. Brooke*, 190 S. W. 642. (10) This contract is absolute on its face. It is not incomplete. Its essential purposes are capable of substantial accomplishment regardless of the destruction of any one mill. The destruction of the mill could have been provided against in the contract. It is not apparent from the contract itself that because of its nature it was dependent upon the continued existence of any one mill. For all of the foregoing reasons, testimony with reference to the destruction of the mill by fire constituted no defense. 9 Cyc. 627. (11) The terms of the contract of June 17, 1912, being unconditional, cannot be varied, altered and contradicted by a letter of April 29, 1910, to which no assent was even given. *Coons v. Chambers*, 1 *Abbott's Practice*, 165; *Loper v. United States*, 13 Court of

Claims Reporter, 269; Harper v. Raymond, 7 Abbott's Practice, 142; Milske v. Steiner, 103 Md. 235.

ALLEN, J.—This is an action to recover for the breach of a written contract upon which, it is alleged, defendants became liable to plaintiff by assuming the same and agreeing to perform the obligations of the other party thereto. It is unnecessary to specially notice the pleadings. The petition is in the usual form. The defenses set up and relied upon will be noticed in the course of the opinion, so far as may appear necessary to a disposition of the appeal.

The trial below, before the court and a jury, resulted in a verdict and judgment for plaintiff in the sum of \$5440, with interest thereon, aggregating in all \$6110.93; and the case is here on defendants' appeal.

Plaintiff, a resident of Milwaukee, Wisconsin, was engaged in selling "mixed feed" for stock, which he shipped into various States. He had no mill or plant, but contracted in advance with others to supply the product with which to fill the contracts entered into by him with his customers. On June 17, 1912, one Goeke and one Dickinson, copartners doing business as F. W. Goeke & Company (hereinafter referred to as "Goeke & Company") were engaged in operating a certain mill or plant in the City of St. Louis, and on that day they entered into a written contract with plaintiff as follows:

"F. W. Goeke & Co., St. Louis, Mo., agrees to sell United States Sugar Feed, Milwaukee, Wis., Co., one hundred and fifty (150), 400-100 lb. sacks each, feed, to be shipped as follows:

5 cars June	30 cars October
15 cars July	20 cars November
30 cars August	20 cars December
30 cars September	

as per following formula per ton

1000 lbs. Elevator Goods
250 lbs. Cotton Seed Meal

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300 lbs. Molasses
350 lbs. Peat or Humus
100 lbs. Grain Screenings

ground and dried as per last year. Protein to be 13 to 14%, Fat 2 to 3%, Fibre 12%.

"Directions for June immediate, for July by July 15th, August, September, October by the 10th of each month, and November by November 1st and December by the 10th.

"Sight drafts to be paid on demand, bills lading attached. Price \$19.50 per ton New York rate points.

"F. W. GOEKE & Co., U. S. SUGAR FEED Co.,

"Per J. F. HEFFERNAN."

On or about July 2, 1912, the firm of Goeke & Company sold its business, trade and good will, etc., to the defendants, Karl Neumond, Eugene Neumond and one Eisemann, copartners doing business under the firm name of "K. & E. Neumond;" and as a part and parcel of the written contract between Goeke & Company and these defendants, whereby such sale was effectuated, the defendants agreed to carry out all contracts of Goeke & Company of such nature as is the contract sued upon. On July 16, 1912, the defendants notified plaintiff they had acquired the plant and business of Goeke & Company, and that they would continue the business and would carry out all contracts made by the latter company; and to this plaintiff replied that he assumed that defendants were "responsible people," and that he would look to them to carry out the contract.

It appears that five car-loads of the feed were shipped by Goeke & Company in June, 1912, as called for by the contract; and that of the fifteen car-loads which, by the terms of the contract, were to be shipped in July, nine were delivered; but on July 28, 1912, defendants' mill was destroyed by fire, and that no further deliveries were made under the contract. On the day following the destruction of the mill defendants notified plaintiff thereof, saying that it would be

impossible to furnish any more feed at that time. On August 1, 1912, defendants wrote a letter to plaintiff saying: "We beg to state that we will not ship any more feed against the contract made on June 17th." It appears that when the last-mentioned letter was written plaintiff was enroute to the City of St. Louis where he arrived on the evening of August 1st. On the following day a meeting was held in defendants' office at which plaintiff, his counsel, defendant Eiseman and defendants' counsel were present. Plaintiff requested that the feed be furnished in accordance with the contract, but was told that defendants would not furnish it. It is said that defendant Eiseman suggested that plaintiff "go out and buy the feed;" and that plaintiff thereupon gave defendant the names of the only "concerns" operating mills, five in number, that he thought would be able to "turn out" feed of this general character in quantities called for by the contract. According to the testimony of both plaintiff and defendant Eisemann it was agreed that plaintiff would visit these five mills, located in different cities, with the view of obtaining the feed at the lowest possible price; and that defendants, on their part, would likewise make efforts to secure a contract for the furnishing of the feed. It appears that plaintiff visited all of the mills mentioned, and—defendants having obtained no results in the meantime—finally secured a contract from the "American Milling Company" to manufacture and furnish the desired quantity of feed at \$21.50 per ton. The feed thus contracted for contained no "humus," as did that called for by the contract sued upon. The evidence is to the effect that plaintiff was unable to obtain a feed containing humus; but that the feed which plaintiff thus contracted for and obtained (though demanding a higher price in the market generally) was secured at the same price as if humus had been used therein.

Such further facts as may appear to be pertinent to questions discussed will be stated in the course of the opinion.

I. It is argued that the trial court erred in receiving the contract in evidence over defendants' objections. This assignment of error proceeds upon the theory that the contract was unilateral, lacking mutuality, and therefore unenforceable. But this view is obviously unsound. This contract provides for the sale by Goeke & Company to plaintiff of a certain definite quantity of mixed feed. Though the contract does not, in explicit words, recite that plaintiff agrees to purchase and pay for the same, this is clearly implied by the acceptance of the contract by plaintiff through the signing of his name thereto. Such was manifestly the intention of the parties (See *Lewis v. Ins. Co.*, 61 Mo. 534, 1 c. 538; 6 R. C. L. 689). And if the contract could be said to have been originally deficient in this respect (which we do not concede) the subsequent correspondence between the parties, and the part performance of the contract according to its terms, sufficed to render the contract mutually binding and enforceable (*Laclede Const. Co. v. Tudor Iron Works*, 169 Mo. 137, 69 S. W. 384; *Eaton v. Coal Co.*, 125 Mo. App. 194, 101 S. W. 1140). The case is not one falling within the doctrine expounded in *Cold Blast Transportation Co. v. Bolt & Nut Co.*, 114 Fed. 77, a leading case, followed by us in the recent case of *Brown Paper Box Co. v. Mercantile Co.*, 190 Mo. App. 584, 176 S. W. 251.

II. The contention that the destruction of the mill by fire excused further performance of the contract under the circumstances is obviously without merit. Nor did the court err in rejecting testimony proffered by defendant with the view of showing the existence of a custom, "in the trade," to excuse the manufacturer in such cases where his mill is destroyed by fire. The contract is absolute upon its face, binding Goeke & Company to furnish the material in question. "If the party entering into a contract of this sort desires to protect himself against contingencies, it is incumbent on him to express the contingencies in his contract; and if he fails to do this, in the absence of fraud or mistake, he cannot show a custom to the effect that his absolute

written contract is not what it reads, but only a conditional engagement." [See *Covington v. Kanawha Coal Co.*, 121 Ky. 681, 89 S. W. 1126, 3 L. R. A. (N. S.) 248; *State v. Public Service Com.*, 189 S. W. 1. c. 379.] It is not a case where the subject-matter of the contract went out of existence, through no fault of the contracting party, rendering the contract incapable of performance. It cannot be said that these parties contracted upon condition that Goeke & Company's mill remain in existence; and consequently the doctrine which appellants invoke (See *St. Joseph Hay & Feed Co. v. Brewster*, 195 S. W. 71) has here no application.

III. A further assignment of error, discussed at length, with the citation of numerous authorities, is that the court erred in overruling the demurrer to the evidence interposed by defendants at the close of the entire case, for the reason that plaintiff was shown to have "aided in and insisted upon an illegal method in the performance and execution of the agreement sued upon," and hence "cannot compel the enforcement of the contract." This has reference to the stamping and tagging of the bags containing the feed shipped under the contract, by which, it is said, the pure food laws, in force in the jurisdictions where the product was sold, were violated.

The written agreement makes no provision concerning the matter of bagging or tagging the goods, and there was no arrangement regarding this at the time of the execution of the contract. The bags contained in the five cars shipped in June—the only cars shipped by Goeke & Company under the contract—bore tags reciting that the feed contained 15 per cent. to 16 per cent. protein, 3 per cent. fat and 12 per cent. fibre; and the bags were likewise so stamped. The tags also indicated that the mixture was composed of cotton seed meal, wheat, corn, oats, malt sprouts, screenings, alfalfa meal and molasses. As appears above, the contract called for 13 per cent. to 14 per cent. protein and 2 per cent. to 3 per cent. of fat; the mixture to be

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composed of "elevator goods," cotton seed meal, molasses, humus and screenings. The evidence is, however, that Goeke & Company had furnished plaintiff with an analysis showing that the product as manufactured ran as high as 15.18 per cent. protein and 2.3 per cent. fat. And according to the testimony for plaintiff, by the term "elevator goods," used in the contract, was meant "a combination of different kinds of ground grain."

Plaintiff admitted that the bags were "tagged wrong," and that there was a "technical violation" of the law in this respect. In this connection, however, he testified at length, by way of explanation, as to the circumstances under which this occurred; this having been brought out by the questioning of counsel for defendants. On cross-examination of plaintiff, defendants' counsel, after referring to the percentage of protein and fat called for by the contract, asked plaintiff: "Why did you order this feed packed in bags containing a different analysis?" Plaintiff thereupon testified, in substance, that in June, 1912, he was in the State of New York, and that, under the contract, it was necessary for him to give "immediate" shipping directions for the five cars to be shipped in June; that he was unable to leave New York at the time, and in order not to lose the benefit of the contract he directed Goeke & Company to use the same tags, and the same stamping upon the bags, as had been used in shipping feed made by that firm for plaintiff during the previous year; that he contemplated taking the matter up with the authorities in New York, in regard to a change in a "statement" previously filed by him in that State, intending then to come to St. Louis and get the matter "straightened up;" that before he could attend to those matters he was called to his home in Milwaukee where he kept his office—sometime in July—and found his desk "piled up with papers," and that within a short time, and before he could dispose of the matters demanding his immediate attention at home, the fire occurred. In the meantime plaintiff, on July

23d, in response to a letter of defendants written on July 20th, directed defendants to stamp and tag the feed "as last year;" and shipments made in July were accordingly so labelled.

In this connection it should be stated that the testimony for plaintiff (which is uncontradicted) is that when plaintiff and his attorney on August 2, 1912, at defendants' office in the City of St. Louis, demanded that defendants carry out the contract, defendants' counsel referred to the tags that had been used, saying: "I am not sure about this tag. . . . I am not sure that this tag correctly states the ingredients;" that plaintiff's counsel then said: "Brand and tag this feed any way that complies with the law. What we are here for is to ask for the feed." . . . "Brand and tag it any way that is right. We want the feed."

It is unnecessary to make further reference to the evidence adduced touching this matter. We think that the court did not err in refusing to peremptorily direct a verdict for defendants on this ground. The contract on its face has no taint of illegality. The tagging and branding of the feed related to the method of performing the contract. It may be conceded that although a contract be valid on its face, it is competent to show that it was intended by the contracting parties to violate the law in the performance thereof; and that the law, in accordance with the maxim, *ex dolo malo non oritur actio*, will not aid either party in carrying out an illegal and fraudulent purpose. We are here concerned with plaintiff's right to recover for defendants' failure to deliver the 136 cars remaining undelivered under the contract. It cannot by any means be said to have been conclusively shown, we think, that plaintiff contemplated an illegal method of performing the contract throughout, or that he sought to obtain the feed remaining undelivered for an unlawful purpose.

The cases cited by appellants which deny a recovery of the price of goods sold contrary to law (e. g. intoxicating liquors) are not here directly in point. In *Church v. Proctor*, 66 Fed. 240, cited and relied upon

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by appellants and respondent alike, the facts were similar to those here involved, and we regard the decision therein as here quite persuasive. The suit was one for damages for the defendant's failure to deliver certain fish—menhaden—in accordance with his contract; and in defense it was contended that plaintiff's purpose in buying the menhaden was to sell the same as mackerel under false labels, contrary to law. In reversing the judgment and remanding the cause, for errors committed at the trial, the court, referring to the defense mentioned above, said:

"If upon any subsequent trial this issue should be raised, and evidence adduced in support thereof, we think the jury should be instructed that no damages can be recovered, and no action maintained, covering any period in which the plaintiff below contemplated, or was actually engaged in, placing upon the market the fish described in the contract, under false, deceptive and misleading brands, designed to attract and induce trade. During the time he entertained such purpose (*Cowan v. Milbourn*, L. R. 2 Exch. 230, 236; *Marterne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331), or was actually engaged in such business, the law will not help him."

In the case before us, the learned trial judge, as appears from instructions given at the instance of both plaintiff and defendants, proceeded upon the theory that, with respect to this issue, plaintiff's right to recover was dependent upon his intent or purpose in making use of the feed contracted for; or, as stated in an instruction given for defendants, that "plaintiff cannot recover in this action for such part of the feed contracted for with which it was intended to violate the law." In this we think that the court did not err.

It may be conceded that with respect to the violation of a "pure food statute" the question of intent is not material. But in this case, owing to the character of the defense asserted, it became essential to determine what the parties, or plaintiff, intended to do with respect to the performance of the contract. We think

that the court below took the correct view of the matter, and that the demurrer to the evidence was well ruled.

IV. We perceive no merit in the contention that error was committed in allowing plaintiff to give the testimony, *supra*, as to his intentions. Testimony of this character on the part of plaintiff was first called forth by a question of defendants' counsel on cross-examination, set out above, viz: "Why did you order this feed packed in bags containing a different analysis?" But this we pass. In *Vansickle v. Brown*, 68 Mo. 627, l. c. 634, it is said: "When a party to a suit is admitted as a witness, he may testify as to the intention with which he did an act, whenever it is material to the issues to determine what such intention was." [And see *Chambers v. Chambers*, 272 Mo. 262, l. c. 282, 283, 127 S. W. 86; *Wheeler v. Chestnut*, 95 Mo. App. 546, l. c. 556, 557, 69 S. W. 621.] Such testimony is admissible for what it may be worth, to be considered by the court or jury in connection with the acts and conduct of the party, shown in evidence, touching the matter. [*Chambers v. Chambers*, *supra*.]

V. Nor do we think that the court erred in refusing to admit in evidence certain contracts entered into between plaintiff and Goeke & Company, and certain letters passing between them, in 1909, 1910 and 1911. Such evidence was sought to be introduced by defendants for the purpose of showing that plaintiff had been "in trouble" with certain "agricultural departments," because of false labels upon his feed. It appears that plaintiff had previously shipped hundreds of car-loads of feed of this general character manufactured for him by Goeke & Company, in the years mentioned. The letters in question were written in regard to certain shipments as to which, it is said, plaintiff had experienced trouble either with his customers or with State agricultural departments; and, among other things, they reveal that it was a matter in controversy between plaintiff and Goeke & Company, as to which of the two parties were at fault with respect to the shipments

referred to. Complaint is specially made as to the rejection of these letters, but the particular transactions to which they relate were not so connected with the matter in controversy, as to time or otherwise, we think, as to make them here admissible. And had this evidence been introduced it would have raised various separate issues regarding plaintiff's acts and conduct in prior years, and would have served only to obscure the real issues on trial. We consequently rule this assignment of error against the appellants.

VI. Appellants complain of plaintiff's instruction on the measure of damages. This instruction is as follows:

"The court instructs the jury that if you find for plaintiff, you should take into consideration what would be a full and just compensation to him for his loss and damages, if any, by reason of the failure of defendants to deliver the feed mentioned in the evidence, and in determining what this compensation should be, you should take the difference, if any, between the actual cost of the best available substitute (provided you further find it was impossible at the time to procure feed exactly like that contracted for at a lower price than that at which the substitute could be obtained, and that plaintiff used due diligence in procuring the substitute feed and bought on the best terms he could), and the price and value that plaintiff agreed to pay for the feed under the contract made by F. W. Goeke & Company, with plaintiff and read in evidence, together with interest," etc.

It is true that ordinarily the measure of the vendee's damages resulting from a breach by the vendor of a contract of this character is the difference between the contract price and the market value of the goods at time and place when and where by the contract they were to be delivered, if the goods have such a market value, or if they have no market value then the difference between the contract price and the reasonable value of the goods (*Consumers' Glue Co. v. Manufacturing Co.*, 193 Mo. App. 90, 181 S. W. 1086, and authori-

ties there cited). But in the case before us the evidence is that the feed in question could not be procured on the open market. It was necessary to have it manufactured according to special formula. And the reasonable value thereof may be said to be the reasonable cost of procuring it. It is true, as appellants say, that plaintiff in this testimony stated that feed of this character had a market price or value, but this had reference to the price at which the mixture, or the nearest available substitute, could be procured under a contract for its manufacture in the quantity called for by the contract. Plaintiff explained, and all of the evidence shows, that the mixture called for by the contract could not be procured in the open market; that it was necessary to have the product specially manufactured. It could not thus be obtained containing humus, and plaintiff therefore, in accordance with defendants' directions, obtained a substitute in which humus was replaced by another ingredient, but at the same price as if humus had been used. The testimony tends to show that the reasonable cost of manufacturing the nearest available substitute was at least \$21.50 per ton. Plaintiff contracted for its manufacture at this price, the other prices quoted him being \$23 or more per ton.

Under the circumstances we think that it was not error to give this instruction. In 2 Sutherland on Damages, section 652, p. 283, it is said:

"The agreement may relate to property which may not be found in the market and can only be produced at an expense greatly above the contract price. In such a case it has been held that if the course pursued by the purchaser in obtaining other like property, as timber, for example, was the only way it could be obtained, or was a reasonable and prudent way of obtaining it, irrespective of any special use or exigence, the difference between the contract price and the higher cost of the property thus obtained may be recovered by the purchaser as damages naturally arising from the breach itself." In this connection see also Wall v. Ice

& Cold Storage Co., 112 Mo. App. 659, 87 S. W. 574; 2 Sedgwick on Damages (9 Ed.), section 734, p. 1534.

In any event, we regard it as quite clear that defendants have no just ground to complain of this instruction. As said above, the uncontroverted evidence is that plaintiff procured the contract for the manufacture of the feed under and by virtue of an arrangement between him and the defendants which had in view the minimizing of the damages as far as possible. Having thus authorized plaintiff to procure a contract on the best terms available, defendants ought not now be heard to complain that a different measure of damages should be applied. And, in view of the evidence adduced, we do not perceive how defendants can possibly be said to have been injured by the instruction. [See *Harrison Wire Co. v. Hall & Willis Hdw. Co.*, 97 Mo. 289, 10 S. W. 619.]

Other questions suggested are either disposed of by what we have said above or do not warrant discussion. We perceive no reversible error in the record, and it follows that the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

ELLA GATES, Respondent, v. KNIGHT TEMPLARS
and MASONIC MUTUAL AID ASSOCIATION,
Appellant.

Kansas City Court of Appeals, April 1, 1918.

1. **LIFE INSURANCE: Assessment Plan: Suicide.** The Statute (section 2945, R. S. 1909) providing that suicide shall be no defense to an action on a life insurance policy, is applicable to insurance companies on the assessment plan.
2. ———: **Suicide: Contracts.** An insurance company doing business on the assessment plan, cannot by contract, under the statutes of Missouri, make suicide a partial defense or reduce the amount of recovery in the event that the insured commits suicide.

Appeal from Macon Circuit Court.—*Hon. Vernon L. Drain*, Judge.

AFFIRMED.

Dan R. and John R. Hughes for appellant.

Guthrie & Franklin and *Elmer O. Jones* for respondent.

BLAND, J.—Defendant, a foreign life insurance company doing business on the assessment plan in this State, insured the life of Erskine M. Gates in the sum of two thousand (\$2000) dollars in favor of his wife who is the plaintiff. The policy provided "that in case a member shall die by his own hand, sane or insane, this Association will pay to the beneficiary the amount of money paid by the member to the Association, without interest, but such payment shall in no case exceed fifty per cent of said sum of two thousand dollars."

It is admitted that the said Erskine M. Gates committed suicide in this State by taking carbolic acid. The defendant refused to pay the face value of the policy but tendered to plaintiff the sum of two hundred, ninety-six and 61/100 (\$296.61) dollars, the amount payable under the policy providing the suicide clause is valid. Plaintiff refused this tender and brought suit for the full amount of the policy, and judgment being rendered in her favor for the amount sued for, defendant has appealed.

It is now firmly settled in this State that section 2945, Revised Statutes 1909 (abolishing the defense of suicide in all cases except where the insured contemplated suicide at the time of his application for the policy), is applicable to insurance companies on the assessment plan. [Section 6959, R. S. 1909; *Collins v. Mut. Life Association*, 84 Mo. App. 1. c. 556; *Logan v. Fidelity and Casualty Co.*, 146 Mo. 1. c. 123; *Toomey v. Supreme Lodge*, 147 Mo. 1. c. 137; *Elliott v. Ins. Co.*, 163 Mo. 1. c. 157; *Anderson v. Missouri Benefit Association*, 199 S. W. 740.] However, it is the contention of the defendant that although suicide is not a defense to

this action, nevertheless, the company may lawfully provide that a smaller amount than the face of the policy be paid in case of suicide, and in support thereof cites the case of *Scales v. National Life & Accident Ins. Co.*, 186 S. W. 948, recently decided by the Springfield Court of Appeals. The St. Louis Court of Appeals in the case of *Applegate v. Travelers Ins. Co.*, 153 Mo. App. 63, had under consideration a policy of insurance which provided that the company "in the event of the death of the said Oliver H. Applegate" (the insured), "loss of limb or sight, or disability caused by gas, vapor or poison, shall pay but one-tenth of the amount otherwise payable." In that case the insured committed suicide by drinking a liquid poison known as carbolic acid and the St. Louis Court of Appeals held that under section 6945, Revised Statutes 1909, the company was liable for the full amount of the policy and could not discharge its obligation by paying one-tenth of the amount, and the same court in the case of *Dodt v. Ins. Co.*, 186 Mo. App. 1. c. 176, approved the Applegate case in very strong language.

The Springfield Court of Appeals in the case of *Scales v. National Life & Accident Ins. Co.*, supra, had under consideration a policy that provided that where death resulted from "any gas, vapor, narcotic, an-aesthetic or poison," the insurance would be for but one-fifth of the amount of the face of the policy (terms similar to those of the policy in the Applegate case), but held, differing from the St. Louis Court of Appeals in the last-mentioned cases, that an insurance company might provide for the payment of a certain amount of money for the death or injury resulting from certain causes and a different amount for a death or injury resulting from other causes where it happens under certain designated circumstances. In the *Scales* case the evidence showed that the insured came to his death by intentionally taking carbolic acid for the purpose of committing suicide. The Springfield Court of Appeals held in that case that the fact that the insured committed suicide had nothing to do with

the right of the company to provide for a less amount of insurance where the insured died by reason of taking poison, and that as the less amount was not based upon any contingency that he died of poison taken with suicidal intent, the question as to whether the insured committed suicide or not was not in the case, there being nothing in the laws of Missouri preventing the company from insuring for a less amount in case of death resulting from any cause, such as the taking of poison, so long as the smaller amount was not based upon the contingency of the insured committing suicide. The Springfield Court of Appeals transferred the Scales case to the Supreme Court on the ground that it was in direct conflict with the Applegate case decided by the St. Louis Court of Appeals.

It is apparent, if the Springfield Court of Appeals had before it the case at bar, that it would decide that the clause in this policy providing for a reduced amount in case of suicide was void, and that plaintiff was entitled to recover the full amount. The clause in the policy in the case at bar does not provide for a smaller amount of insurance in case the accident happened under any other conditions except that of suicide on the part of the insured. This case is to be distinguished from that of the Scales case, for the reason that the decision in the Scales case is based, as we have already stated, on the proposition that the company may provide for a less amount of insurance when the policy contemplates that there shall be the smaller amount, whether the poison was taken accidentally or with the intention of committing suicide. The provision of the policy in the case at bar is entirely unlike the provision of the policy in the Scales case, as the only cause providing for the reduction of the amount of this policy is in case the insured committed suicide.

We recently had this same question before us in the case of *Anderson v. Missouri Benefit Association*, supra, and decided that the company, under our statute,

cannot by contract make suicide a partial defense or reduce the amount of recovery.

From what we have said we are not concerned with the difference of opinion between the St. Louis and Springfield Courts of Appeals on the question involved in the Applegate and Scales cases, and we do not deem that this opinion is in any wise in conflict with the opinion of the Springfield Court of Appeals.

The judgment is affirmed. All concur.

JOHN H. DAVIS, et al., Defendants in Error, v.
WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error.

Kansas City Court of Appeals, April 1, 1918.

1. **PLEADING: Petition: Cause of Action: Reply.** The petition is the place where one's cause of action must be found pleaded; and one cannot declare upon one cause of action in a petition and recover upon a distinct cause of action in a reply.
2. ———: ———: **Telegraph Company: Estoppel Pleaded in Reply.** Where a plaintiff instituted an action against a telegraph company for a penalty under section 3330, R. S. 1909, for failure to promptly transmit and deliver a message, and the company by its answer makes the defense that its wires were down by reason of storms and floods; the plaintiff, in reply, may plead estoppel in that defendant did not inform plaintiff of that fact when he delivered the message to its agent, as required by section 3332 of the statute.
3. **INTERSTATE COMMERCE: Sending and Receiving Points in One State.** Notwithstanding both the sending and receiving points for a telegram are in one State, yet if its route of transmission is partly through another State, it is interstate commerce.
4. ———: **State Police Power: Regulation of Telegraph Company.** Prior to June 18, 1910, when Congress asserted its authority over telegraph companies by placing them under the provisions of the interstate commerce statute, the States, in the exercise of their police power, could enforce penalties against such companies for negligent service. But since the enactment of that federal statute, the States have no such power, Congress having taken possession of the entire ground of regulation.

Appeal from Adair Circuit Court.—*Hon. C. D. Stewart,*
Judge.

REVERSED.

New, Miller, Carnack & Winger, Albert T. Benedict
and *D. J. McCulloch*, for plaintiff in error.

Weatherby & Frank for defendants in error.

ELLISON, P. J.—Between two and three o'clock p. m. July 13, 1915, plaintiffs delivered to defendant's agent at Kirksville, Adair county, Missouri, a telegraphic message to be sent to one A. Hulse at Yarrow, a small town in same county and State. They paid the charges and the agent accepted the message. It was not delivered to Hulse until near four o'clock of the next evening. Thereafter, plaintiffs began this action for the penalty of three hundred dollars provided in section 3330 Revised Statutes 1909. The case was tried by the court without the aid of a jury. No declarations of law were asked by either party, save a peremptory direction that the court find for defendant which was refused. The judgment was for plaintiffs.

It is alleged in plaintiffs' petition that upon the defendant's agent receiving and accepting the message "it became and was the duty of defendant, through its said agent, to promptly, with impartiality and good faith to transmit and deliver said message to the designated address and to use due diligence to place said message in the hands of the addressee by the most direct means available without material alterations, under a penalty of \$300 for neglect or refusal so to do." It is then alleged that defendant failed to so deliver the message, "wherefore plaintiffs say that by reason of the facts alleged defendant has forfeited the sum of \$300. . . , and that by reason of the facts alleged plaintiffs are entitled to recover of the defendant the sum of \$300," for which they pray judgment.

Defendant's answer was a general denial, together with allegations that an unprecedented storm had thrown

down its wires and prevented a prompt transmittal and delivery and that such impairment of its service was the sole cause of the delay. It was then pleaded that the most direct means, and only available route, for a message from Kirksville to Yarrow, was around through the State of Iowa, by which it was transmitted, and that it thereby became an interstate message, under interstate commerce law, not subject to regulation and imposition of penalties by the statute of Missouri.

Plaintiffs made reply to this answer, in which, after denying new matter, there was a plea of estoppel based on the failure of defendant's agent to inform plaintiffs that the wires were down, as is required by section 3332.

We have gone over the entire evidence and find the following to be the facts established without contradiction: That plaintiffs at some time between two and three o'clock p. m. of July 13, 1915, delivered the telegram in controversy to defendant's agent at Kirksville to be transmitted to Hulse at Yarrow and that it was not delivered to him until about four o'clock p. m. next day. And that from the time plaintiffs delivered the message in Kirksville (or earlier) until the afternoon of the next day, defendant's communication with Yarrow was cut off by storms, or floods, having put the wires out of service.

The evidence further showed, without contradiction, that on account of the wires being out of service between Kirksville and Yarrow by the usual and natural route, viz., by way of Novinger or Milan, Missouri, defendant routed it through Des Moines, Iowa. On this basis defendant made claim that the telegram came under the control of the interstate law and that the penalty authorized by the Missouri statute for delay in transmitting or delivering could not be recovered.

On account of defendant having thus shown that it was prevented from transmitting and delivering promptly by reason of the wires being down, plaintiffs have endeavored to show defendant to be estopped from such defense by the claim that the agent did not inform

plaintiffs when the message was delivered that the wires were down as required by section 3332, imposing a like penalty of three hundred dollars for failure to give such information to persons sending telegrams. On this question of fact, while defendant undertook to prove that its agent did inform plaintiffs of the condition of the wire, yet there was evidence in plaintiffs' behalf tending to show that no such information was given and, since the finding in plaintiffs' favor, we must assume the fact to be as claimed by plaintiffs.

With this concession of fact comes the question whether, under the pleadings as applied to the statute, plaintiffs have made a case. Two sections of the statute are involved, viz., 3330 and 3332. The first of these declares that if a sender of a telegram desposits it with the company's agent with a payment of charges, it becomes the duty of such company to use due diligence to transmit and deliver to the addressee by the most direct means available "promptly and with impartiality and good faith, under a penalty of three hundred dollars for every neglect or refusal so to transmit and deliver." It will be seen that the petition follows the lines of this section and is undoubtedly bottomed thereon.

The second section (3332) provides, as already stated, that if the defendant's line is out of order when a message is delivered to it for transmission and delivery it is the duty of the agent "plainly to inform" him of that fact; "and for omitting so to do, . . . ; the company by which he is employed shall incur a like penalty as in section 3330." As intimated above, plaintiffs' petition was confined exclusively to matters constituting a cause of action under section 3330, no mention being made of anything required by section 3332. But when defendant, by its answer, pleaded as defensive matter, that storms and floods had put its wires out of service, plaintiffs then, in their reply, pleaded that defendant's agent did not inform them of that fact as it was his duty to do under section 3332, but, on the con-

trary, accepted the message for prompt transmission and delivery without notifying or advising plaintiffs of any condition of the wires which would prevent such prompt service, and in consequence "plaintiffs relied upon defendant's duty and implied promise to promptly and impartially transmit and deliver said telegram, and plaintiffs allege that by reason thereof defendant is now estopped to claim and set up as a defense herein any impaired condition of their wires and appliances."

Defendant has treated this reply as setting up a new cause of action based on section 3332, and as being, practically, and abandonment of the cause alleged in the petition. If that is a correct interpretation of the reply, defendant is undoubtedly right, for the petition is the place where the cause of action must be found pleaded. One cannot declare upon one cause of action in a petition and recover upon a distinct cause set up in a reply. [Moss v. Fitch, 212 Mo. 484, 502-504; Hill v. Mining Co., 119 Mo. 9, 30; Mohney v. Reed, 40 Mo. App. 99; Ham v. Railroad, 149 Mo. App. 200, 209.]

But we do not consider that plaintiffs stated a new cause of action in the reply. It is true that they there, for the first time, set out the provisions of section 3332; but notwithstanding certain expressions in their reply brief, this was not for the purpose of stating a cause of action based on that section. It was merely for the purpose of showing the duty laid upon defendant's agent to inform plaintiffs when they delivered the message for transmission, that the wires were out of service. After setting out the statute imposing this duty and alleging that the agent accepted the message and price for transmission, yet failed to inform plaintiffs that it could not be sent, they alleged defendant was estopped from invoking the defense of the wires being down and out of service. As a plea of estoppel it found its proper place in the reply, for the fact that the wires were out of service first made its appearance in the case through defendant's answer. And, if the facts be as charged in the reply, defendant should be estopped by such conduct. Telegraphic communication means quick and

prompt service unless there be some cause preventing it. If there is, it is the duty of defendant, under the provisions of section 3332, to make it known and this duty may be made the ground for estoppel in an action for delay under section 3330.

Notwithstanding there might be estoppel, if the action is to be governed by these sections of the State statute, we have seen that defendant claims the message to be interstate commerce and governed by the federal statute and federal decisions interpreting such statute, and that it is therefore not amenable to the State law. There is no doubt that defendant's claim is right. Although both the sending and receiving points were in Missouri, the fact that a part of the route of transmission was through Iowa characterizes the message as interstate. The route must be entirely domestic to keep it from the cover of the federal statute. [Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617; Bateman v. Western Union Telegraph Co., 93 S. E. (N. C. 1917) 467, Western Union Telegraph Co. v. Kaufman, 162 Pac. (Okla. 1917) 708; Western Union Telegraph Co. v. Bolling, 91 S. E. (Va. 1917) 154.]

It is suggested that though the message may have been interstate commerce, yet the State has a right as a part of its police power of regulation, to impose penalties for violation of such regulations as do not necessarily pertain to the service of the company in transmitting and delivering the message. When Congress has not asserted its authority, there are doubtless powers of regulation of interstate commerce which a State may exercise under its police powers when such regulations do not hinder or embarrass commerce (Western Union Telegraph Co. v. James, 162 U. S. 650); and a State statute imposing a penalty for failure to diligently transmit and deliver a telegram is not a hinderance but rather a stimulant to such commerce. [Ib 658, 660.] But it is stated in that case (p. 660) that this is only true "until Congress speaks upon the subject," and that qualification is made in all decisions upholding State regulations of such character. [The

Minnesota Rate Cases, 230 U. S. 352, 402, 405, 408, 409; Southern Ry. Co. v. Reid, 222 U. S. 424, 436.]

Since the decision in the James and similar cases, Congress has spoken in the Act June 18, 1910, ch. 309, sec. 7, 36 State 544. U. S. Comp. St. 1913, sec. 8563, in which it placed telegraph companies under the legislation as to interstate commerce. By that enactment it has been held, wherever the question has arisen, that Congress took possession of the entire ground of interstate commerce by telegraph, thereby superseding all penal State statutes of the kind upon which this action is founded. [Adams Express Co. v. Croninger, 226 U. S. 491; Western Union Tel. Co. v. Bilisoly, 116 Va. 562; W. U. Tel. Co. v. National Bank of Berryville, 116 Va. 1009; Western Union Tel. Co. v. Bolling, 91 S. E. (Va. 1917) 154; Norris v. Western Union Tel. Co., 93 S. E. (N. C. 1917) 465; Western Union Tel. Co. v. Lee, 174 Ky. 210.]

We were in error in deciding *Hewitt v. Telegraph Co.*, 172 Mo. App. 272, by reason of our failing to note that the decisions we relied upon were made under the law as it was before June 18, 1910, when Congress placed telegraph companies under federal regulation.

The judgment will be reversed. All concur.

E. T. MESSENBAUGH, Admr., Respondent, v. JOHN GOLL, Admr., Appellant.

Kansas City Court of Appeals, March 4, 1918.

1. **ESTATE BY THE ENTIRETY:** Note: Share and Share Alike. A note payable to husband and wife "share and share alike" does not create an estate by the entirety, and upon the wife's death the husband is not entitled to the note as survivor.
2. **SEPARATE ESTATE:** Husband and Wife: Note: Payee: Express Assent. Where a note given for purchase money of the wife's separate real estate is made payable to her and her husband "share and share alike," the husband does not have any interest in it, since, to have such interest, the wife by provision of the statute, must give

Messenbaugh v. Goll.

her express assent in writing, and allowing the husband to be made a payee in the note is not such express assent.

3. **HUSBAND AND WIFE: Heir: Administrator: Title: Action.** By provisions of the statutes of Missouri (Sec. 350, R. S. 1909) where a wife dies childless, the husband is her heir to one-half of her personal estate. But upon her death the legal title to such personal estate passes to the administrator of her estate to be administered and distributed under the direction of the probate court, and the husband cannot maintain an action against him for possession of any of such property while in the course of administration.

Appeal from Caldwell Circuit Court.—*Hon. Arch B. Davis, Judge.*

AFFIRMED.

Greenwood & Cleveland and Paul D. Kitt for respondent.

Scott J. Miller for appellant.

ELLISON, P. J.—This action is replevin whereby plaintiff seeks to recover possession of a promissory note. The case was tried by the court without the aid of a jury and judgment rendered for plaintiff.

It appears that Frances Pilkington was married to James Cullen in the year 1900. Before her marriage she owned a tract of real estate. That several years after her marriage she sold the land, her husband joining in the deed, to one John Goll and in part payment took his note, secured by deed of trust on the land, for \$6500, payable in five years "to the order of Frances D. Cullen and James Cullen, share and share alike with interest, at the rate," etc. Afterward, in December, 1915, Frances died childless, without a will and in the following month James, her husband, died. Plaintiff was appointed administrator of Frances' estate. Defendant was appointed administrator of James' estate, and as such took possession of the note in question as the property of James' estate and this action by plaintiff as administrator of the wife's estate followed.

Defendant's grounds of defense may be said to be three fold: First, that Frances and James had an estate by the entirety in the note. Second, if an estate by the entirety was not created, then each had an undivided half interest therein. Third, if neither of these contentions is correct, James had an interest by inheritance as statutory heir of his wife and distributee of her estate.

We are satisfied that by the provision of the note itself an estate by the entirety did not exist in the note. An entirety is *all* and an estate by the entirety is where both the husband and wife own all the estate. They hold *per tout et non per mi*. Each has an ownership in the whole. [Craig v. Bradley, 153 Mo. App. 586, 592.] The whole estate vests in both as one person, and when one dies the entire estate remains in the survivor. [Gibson v. Zimmerman, 12 Mo. 385; Craig v. Bradley, 153 Mo. App. 385, 597.] So when Frances and James had themselves designated as payees in the note "share and share alike," they attempted to create an interest in it which we designated in Craig v. Bradley, *supra*, as the antithesis of entirety. Defendant has called our attention to the recent case in the Supreme Court of Haguewood v. Britain, 199 S. W. 950. We find it to be totally different on the facts from this case and wholly without application.

Nor do we think that James became entitled to one-half interest in the note. Although the expression "share and alike" showed an intention in the mind of both, that each should have an undivided half interest in it, yet the statute, in terms, prevents the husband acquiring that interest. The note represents part of the purchase money of the wife's separate real property (Sec. 8309, R. S. 1909), and the title to such note or any part of it, can only be vested in the husband in the manner directed by statute, viz., by giving her "express assent in writing" with "full authority" to him "to sell, incumber or otherwise dispose of same for his own use and benefit." [Section 8309, R. S. 1909.] When Frances had the note executed to James for one-half interest

therein, it was merely^{*} in effect, a verbal gift to him of such interest, and was in the face of the statute which we have just noticed. The Supreme Court has held that a blank endorsement of a note by his wife and delivery to the husband did not constitute the assent required by statute. [McGuire v. Allen, 108 Mo. 403.] It was held by that Court, that such endorsement and delivery was not the "express assent in writing" required by the statute. [Hurt v. Cook, 151 Mo. 416, 426-431; Case v. Espenschied, 169 Mo. 215.] And so we have held. [Moeckel v. Heim, 46 Mo. App. 340; Company v. Crowley, 167 Mo. App. 414, 417.]

Taking up defendant's last theory of defense, we find that the husband by the death of his wife without children became her statutory heir to one-half of her entire personal estate (Sec. 350, R. S. 1909). Whether this note, or a part of it, would fall to his share of such entire estate, as such heir, will depend upon partition or division and distribution in the probate court. The legal title to the personal estate which she had at her death is in her administrator (Becraft v. Lewis, 41 Mo. App. 546, 552; State ex rel. v. Moore, 18 Mo. App. 406), and after due proceeding in the probate court as directed by statute, if not taken for debts, it would be distributed and the husband's part set off to his administrator. Until that time it rightfully should be in the possession of the administrator of her estate. Finding ourselves in accord with the circuit court, we affirm the judgment. All concur.

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By JOHN M. CLEARY

(Cases are inserted in the order received by the publisher.)

ACCORD AND SATISFACTION.

1. **Evidence: Burden of Proof.** The burden of proving the issue as to whether there was an accord and satisfaction, is upon the party who set same up as an affirmative defense. *Zinke v. Knights of Maccabees*, 399.
2. **Sufficient to Go to Jury.** Whether there is evidence of accord and satisfaction sufficient to go to the jury, is a question of law for the court. *Ib.*
3. **When a Question of Law.** Where the facts in respect to an accord and satisfaction have been ascertained or are not in dispute, their effect is purely a question of law for the court, and is not to be submitted to the jury. *Ib.*
4. **New Contract: Validity: Consideration.** Where a fraternal benefit association paid the beneficiary of a certificate twice the amount of the premiums paid in by the member on the theory that he had committed suicide, and in an action for the full amount of the certificate asserted that such payment was an accord and satisfaction, which is a method of adjusting a contract or a tort by substituting for such contract or cause of action an agreement for the satisfaction thereof and an execution of such substituted agreement, the payment cannot be sustained as an accord and satisfaction, there being no new contract between the parties or any consideration on which to base the same; the benefit certificate merely providing that in case of suicide the association should be liable only for twice the amount of the premiums paid in by the member. *Ib.*

ACTIONS. See **Divorce**.

ADMINISTRATORS. See **Husband and Wife**.

ADMISSIONS. See **Evidence**.

AGENCY. See **Compromise and Settlement**.

ALIMONY. See **Divorce**.

ANIMALS.

Running at Large: Impounding. An animal running at large may be impounded though it escapes through no negligence of the owner, and though he commenced pursuit therefor and continued it till the animal was taken by the impounder. *Ferry v. Sawyer*, 30.

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APPEAL AND ERROR.

1. **Harmless Error: Instructions.** In the absence of evidence that plaintiff's cow, struck by a railway train, crossed over a cattle guard, the evidence showing that she reached the track by going through railway company's defective fence, instructions, not submitting question as to defects in cattle guard, were harmless. *Montgomery v. Deering etc. Ry. Co.*, 12.
2. **Harmless Error: Evidence: Conclusion of Witness.** Having described actual condition of railway fence in action for injury to cow struck by a train, witness' conclusion that fence was bad, was harmless. *Ib.*
3. Where witness, in answer to question, stated that he had heard of no cow being struck by a train in the community other than plaintiff's cow, admission of such evidence was harmless, although the evidence was hearsay. *Ib.*
4. **Reservations of Ground of Review: Objection to Pleading.** If the petition was not sufficiently definite, appellants should have taken advantage of the defect by motion before trial. *Burnham v. Williams*, 18.
5. **Review: Harmless Error: Instruction.** Where the landlord admitted that he wrote the assignment himself, instructions predicating the assignee's right to possession on a finding that the landlord had knowledge of the assignment was harmless, though erroneous, since under the statute the assignment was good without the knowledge or consent of the landlord. *Edwards v. Collins*, 569.
6. **Reversible Error: Instructions.** It was reversible error, where the principal instruction for plaintiff covering the whole case failed to state that signals required at railroad crossings by Revised Statutes 1909, section 3140, only applied to those walking along the highway, although the court gave such an instruction at defendant's request. (*Kerr v. Bush, Receiver*, 607.
7. **Abstracts: Abridging Evidence.** Where the evidence was comparatively short and the material part of it was documentary, and, though the oral evidence might have been further condensed by putting more of it in narrative form, it covered only thirteen printed pages, there was a fair effort to comply with the rules as to abstracts. *Bank of Malden v. Wayne etc. Co.*, 601.
8. **Briefs: Numbering Points.** Appellant's failure to number the propositions of law stated in its brief under its points and authorities was not very material, where the court experienced no difficulty in understanding the facts or the propositions of law relied on for reversal. *Ib.*
9. **Review: Harmless Error.** In a servant's personal injury action where he alleged three grounds of negligence, the defendant master cannot object that the instructions given at his own request limited the servant's right of recovery to one ground only, it appearing that the one act of negligence submitted was the proximate cause of the injury, for the failure to submit the other grounds of negligence was at least harmless. *Bridges v. St. Louis etc. Ry. Co.*, 576.

APPELLATE PRACTICE. See *D'vorce*.

1. **Review: Verdict: Weight of Evidence.** Where there was evidence sufficient to sustain the verdict for plaintiff, the weight and sufficiency of the evidence cannot be reviewed on appeal, and the

APPELLATE PRACTICE—Continued.

verdict must be upheld, not having been interfered with by the trial court. *State ex rel. v. Boepple et al.*, 63.

2. **Review: New Trial.** On appeal from an order granting a new trial, the appellate court is not confined to the grounds assigned by the trial court in sustaining the motion but may take into consideration other grounds thereof, and will affirm the ruling if it appear that the granting of the new trial was proper on any ground of the motion—with the qualification, however, that where the trial court has impliedly overruled an assignment in the motion that the verdict is against the weight of the evidence, the appellate court will not affirm the ruling granting a new trial, if erroneous on the ground or grounds assigned, and not otherwise justified, by holding that the verdict is against the weight of the evidence and that for this reason the granting of the new trial was proper, since to do so would require that the appellate court weigh the evidence; though the appellate court may uphold the granting of the new trial if the verdict is supported by no substantial evidence. *Robert v. Rialto Bldg Co.*, 121.
3. **Wills: Contest: Evidence: Sufficiency: Review.** Where there is no evidence of any substantial character or probative force to support the finding and judgment of the circuit court, adjudging that certain heirs contested a will and thereby forfeited their respective legacies under the will, the judgment cannot be sustained. *Puller, exec., v. Ramsey et al.*, 261.
4. **Review: Verdict.** In an action on a fraternal benefit certificate, the defense being suicide, *held* that under the evidence a judgment for plaintiffs could not be reversed on the ground that the verdict for them was so manifestly against the weight of the evidence as to suggest passion, prejudice, or partiality. *Vormehr et al. v. Knights of Maccabees*, 276.
5. **Trial Practice: Disposition of Cause.** It is for the jury, or the court, if trial without a jury, to fix the amount of recovery in accordance with the evidence in the case—not the appellate court. *St. Paul, Etc. Mfg. Co. v. Gaus et c.* *Mfg. Co.*, 416.
6. **Judgments: Final Judgment.** A judgment that substantially follows the provisions of section 8235a, Laws of 1911, p. 314, adjudging, in the same suit, the rights of the parties having mechanic's liens, and directing the sheriff to hold the proceeds of the sale subject to the order of the court, the court retaining jurisdiction for the purpose of making "such further orders and decrees as may be proper," *held* a final judgment from which an appeal would lie: a judgment being final for purposes of appeal, although some incidental judgment or dependent matter may remain for adjustment, or further proceedings may be contemplated and necessary in the execution of the judgment order, or decree. *Hydraulic etc. Brick Co. v. Lane et al.*, 438.

ASSAULT AND BATTERY. See **Witnesses.**

ASSIGNMENTS. See **Landlord and Tenants.**

ATTACHMENTS.

1. **Nonresidence: Bond: Appearance.** Where a defendant is a nonresident an attachment may issue without bond; but if he will enter his appearance and answer, the attachment will be dissolved, *if he so requests.* *Pitman v. West et al.*, 92.

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ATTACHMENTS—Continued.

2. **Contesting Creditors: Superiority of Lien.** P sued W (a nonresident) by attachment and did not give bond. W answered and entered his appearance and asked that the attachment be dissolved. No action was taken by the court on the request at the time, but about six months thereafter P filed an attachment bond with the clerk and sought to revive or continue the attachment. In the meantime C sued out an attachment against W, gave bond, and had it levied on same land. It was *held* that even if P's attachment could be revived, it would not relate back to the original attachment and thus cut out C's attachment and that C had the prior and superior lien. It was also *held* that when W entered his appearance and answered to P's action and requested that the attachment be dissolved, it became the duty of the court to dissolve it, and such action by W practically did dissolve it so far as to permit C's attachment to become the superior lien. *Pitman v. West et al.*, 92.
3. **Appearance: Dissolution.** Where a nonresident defendant is sued by attachment without an attachment bond and the defendant enters his appearance, answers and asks that the attachment be dissolved, though the court does not formally order its dissolution and the cause is continued, yet, if in the meantime another attachment suit is brought by another party and a bond given, it will be adjudged the superior lien. *Ib.*

AUTOMOBILES. See **Municipal Corporations.**

BAILMENTS.

1. **Evidence: Question for Jury.** Evidence as to receipt of property by defendant as bailee, *held*, sufficient to go to the jury. *Robert v. Rialto Bldg. Co.*, 121.
2. **Instructions: Evidence: Prima-facie Case.** Instruction as to liability of defendant as bailee *held* proper, though defendant claimed that he was a gratuitous bailee, where plaintiff made a prima-facie case by evidence tending to show the bailment and failure to return the property on demand; there being no evidence rebutting this showing, and no claim that the property had been lost or destroyed. *Ib.*

BANKRUPTCY. See **Bills and Notes: Compositions with Creditors.**

1. **Suits by Trustee in Bankruptcy: Estoppel.** A bankruptcy trustee is not estopped from recovering corporate funds diverted to paying private debts of officers by the alleged consent of the directors and stockholders, since the trustee also represents corporate creditors. *McCullam, Trustee, v. Buckingham Hotel Co.*, 107.
2. **Misapplication of Corporate Funds: Suit by Trustee in Bankruptcy.** A bankruptcy trustee may recover corporate funds diverted by an officer for paying his private debts while the corporation was insolvent, although many creditor's claims represented by the trustee accrued subsequent to such diversion. *Ib.*

BANKS AND BANKING.

Deposits: Application on Debts: Effect. Where plaintiff sent check, with notation, "To be used in part renewal of note," to a third person, who deposited the check with defendant bank, the bank's action in thereafter charging the account of the third person with the amount of two notes which the bank had previously discounted, and had been dishonored, did not affect defendant bank's right to retain which had been dishonored, did not affect defendant bank's right to retain the proceeds of the check. *Howard Co. v. International Bank*, 284.

BILLS AND NOTES. See Equity.

1. **Notes: Endorsement: Bank Cashier: Directors: Ratification.** Under the provision of section 1112, R. S. 1909, the endorsement by a bank cashier of one of the bank's notes without previous authority from the board of directors, is void and cannot be ratified by the directors. *Bank of Kirksville v. Sloop et al.*, 225.
2. **General Denial: Title to Note: Cashier: Authority.** Under a general denial, the makers of a promissory note to a bank, in an action against them by an indorsee, may show that the endorsee got no title by reason of the endorsement being made by the cashier of the bank who had not been previously authorized by the board of directors. *Ib.*
3. **Title: Void Endorsement: Remedy of Endorsee.** Where the cashier of a bank endorses one of its notes without authority first had from the board of directors, no title is conveyed and the makers may make this defense against the endorsee. The remedy of the endorsee in such instance is to compel the bank to refund the purchase money; or, perhaps, to make an endorsement which will convey the title. *Ib.*
4. **TriPLICATE: Deed of Trust: Negotiations: New Issue: Rival Claimants.** C fraudulently procured a note to be executed to himself in triplicate with a deed of trust securing one note, not designating which one. He then negotiated one of the notes to a bank for a loan, then paid the loan and took up the note. Then he several different times re-negotiated the note as collateral for loans, taking it up each time, until finally he negotiated it to H, a present claimant. The day C sold and negotiated to S, the other note was in the hands of one of his various endorsees, but on the next day he took it up and held it for a time, and then continued to re-negotiate it and take it up until it reached H, the present claimant. It was *held*, that when C took up the note and re-negotiated it to H, it was a new issue by him and being subsequent to the purchase of the other note by S, it left the latter entitled to priority of the lien of the deed of trust. *Casner v. Schwartz et al.*, 236.
5. **TriPLICATE: Fraud: First Negotiation: Priority.** When a note is fraudulently executed in triplicate with a deed of trust securing payment of the note, the one first negotiated will be considered the real note, entitled to priority in the lien of the deed of trust. *Ib.*
6. **Negotiation: Reissue.** When the payee in a note negotiates it to an innocent purchaser and in the course of business again becomes the holder and again negotiates it, it is a reissue or new issue of the note. *Ib.*
7. **Knowledge: Equities: Original Payee.** While one with knowledge of the infirmity of a note who purchases it from an innocent holder will get a good title free of equities in favor of the maker, yet this rule does not reach so far as to include the payee, who may, in the course of business, again become the owner of the note, as to him the note is subject to any defense as if it had never been negotiated by him. *Ib.*
8. **Checks: Bankruptcy: Proving Claims.** Where plaintiff received a note in the course of business, and negotiated it, and afterwards sent a check to maker with the notation, "To be used in part renewal of note," and maker indorsed and deposited check in defendant bank, checked against it, failed to renew the note, went into bankruptcy, and plaintiff was required to take up the note, *held* in a suit against the bank for the recovery of proceeds of the

BILLS AND NOTES—Continued.

- check, that plaintiff could not recover. *Howard Co. v. International Bank*, 284.
9. **Negotiability: Restriction: Statement of Transaction which Gives Rise to Instrument.** Notation on back of check "To be used in part renewal of note," did not destroy its negotiability, but was a statement of the transaction which gave rise to the instrument within Rev. St. of Mo. 1909, section 9974, providing that such a statement does not render a promise to pay conditional. *Ib.*
 10. **Deposit: Effect.** Where plaintiff sent check, endorsed, "To be used in part renewal of note," payable on its face to a depositor of a bank, which bank accepted it with the depositor's endorsement in the usual course of its banking business, giving credit to the payee for the amount, the bank became a bona-fide holder and purchaser for value. *Ib.*
 11. **Subscription to Endowment Fund: Consideration: Evidence.** In a proceeding on a note payable out of the maker's estate twelve months after his death, and reciting that it was a subscription to the endowment fund of a college, evidence *held* to show that there was no consideration for the note. *Trustees of La Grange etc. College v. Parker, Admr.*, 372.
 12. **Necessity.** A note given as a subscription to the endowment fund of a college was a mere promise of a gift and unenforceable, where no consideration was given for the note, either by expending money or incurring enforceable liabilities in reliance thereon, nor in any other way, especially where it was payable out of the maker's estate after his death. *Ib.*

BILLS OF LADING. See *Common Carriers*.

Transfer of Property Shipped: Intention of Parties. Bills of lading to shipper's order delivered to a bank puts the legal title to the property shipped in the bank, but where this is done, not to effect a sale of such property but merely to afford security, then the legal title does not pass to the bank. Whether there was a sale to the bank depends upon the intention of the parties. *Cochrane et al. v. First State Bank*, 619.

BONDS.

Statutory: Construction. In construing statutory bonds the general language of the bond must be interpreted in the light of the statute pertaining to the subject-matter of the bond, such statute being read into the bond and sureties are held to have contracted with a view to such statute. *County of Jackson v. Enright et al.*, 527.

CERTIORARI. See *Habeas Corpus*.

CHATTEL MORTGAGES.

1. **Effect: Removal of Property.** Personal property, though subject to a chattel mortgage, may be moved at will by the mortgagor; such removal at most only subjecting the mortgagor to foreclosure. *United Iron Works Co. v. Sleepy Hollow M. & D. Co. et al.*, 562.
2. **Removal of Property: Lien.** The removal of personal property which was subject to a chattel mortgage to another locality and county will not destroy the mortgage lien or subordinate it to a subsequent one. *Ib.*

CHATTEL MORTGAGES—Continued.

3. **Priority: Mechanics' Liens.** As there are no provisions for the severing of subsequent additions or improvements in the case of mortgages on personalty or chattels real, so as to allow the enforcement of mechanics' liens only against the betterments or to the extent of the enhanced value, as are made by Revised Statutes 1909, secs. 8215, 8216, 8219, for the severance of improvements from land, one holding a chattel mortgage on a concentrating mill takes priority over a subsequent mechanic's lien claimant who performed labor and furnished material in the removal of the mill from one point to another, and its subsequent rebuilding, the structure as rebuilt preserving its identity with the original structure. *Ib.*
4. **Priority: Mechanics' Liens: Equitable Estoppel.** In such case, the chattel mortgage cannot be denied priority on the theory of estoppel or ratification of the contract with the mechanic's lien claimant merely because the chattel mortgage provided that the concentrating mill could be moved and rebuilt at another point, for, except for the provision prohibiting removal under penalty of foreclosure, the mortgagor was entitled to remove the mill, and the purpose of the clause was merely to identify the structure in its new and old locations. *Ib.*
5. **Recording: Place of Recording.** Under Revised Statutes 1909, section 2861 requires chattel mortgages to be recorded in the county in be valid against any person other than the parties thereto, unless possession is delivered and retained, or unless the mortgage be acknowledged or proved and recorded in the county in which the mortgagor resides, chattels mortgages not recorded in the county where the mortgagor resides are invalid as against other creditors, though recorded in another county where the mortgaged property is situated. *Bank of Malden v. Wayne etc. Co. et al.*, 601.
6. **"Residence of Corporation."** Revised Statutes 1909, section 3339, requires a corporation's articles of agreement to state the name of the city or town and county in which the corporation is to be located. Section 3340 requires such articles to be recorded in the office of the recorder of deeds of the county or city in which the corporation is to be located. Section 2975 requires the certificate of incorporation issued by the Secretary of State to be filed and recorded in the county in which the corporation is organized. Section 2861 requires chattel mortgages to be recorded in the county in which the mortgagor resides. *Held*, that within the meaning of this last section a corporation resides in the county designated in its articles of incorporation and certificate of incorporation and in which it has an office at which much of its business is transacted, though its manufacturing plant and business office in connection therewith are across the line in another county, and a chattel mortgage recorded in the county in which the manufacturing plant is located is ineffective and void as against an attaching creditor. *Ib.*

CITY ORDINANCES. See **Municipal Corporations.**

COMMON CARRIERS.

1. **Damages to Meats: Insurers.** A packing company delivered to a railroad company for shipment fresh meats packed in shippers' refrigerator cars with directions to the carrier for icing in transit. The meat was spoiled when it reached destination. The action was based on the common-law liability of the carrier as an insurer. It was *held* that the verdict of the jury, as to the first count would not be disturbed, but because the bill of lading covering the car in-

COMMON CARRIERS—Continued.

volved in the third count contained a provision requiring notice in writing within four months of a claim for damages, which was not given, the verdict on the third count was reversed. *The Cudahy Packing Co. v. The Atchison etc. Ry. Co.*, 520.

2. **Bills of Lading: Notice of Claim.** The purpose of the provision in a bill of lading requiring notice of a claim for damages is to allow the carrier an opportunity to investigate and either settle the claim or prepare for a contest, and while substantial compliance with such a provision is sufficient, the notice must be one of a *claim* and not merely of a damaged shipment. *Ib.*

COMPOSITIONS WITH CREDITORS.

1. **Secret Preferences: Validity.** A creditor fraudulently securing a secret preference over other creditors cannot recover on a note representing such preference after receiving payment under a composition agreement. *Ferguson etc. Co. v. Beuckman*, 41.
2. **Bankruptcy: Promise after Discharge: Consideration: Moral Obligation.** A debtor who has gone into a composition with his creditors, or who has been discharged in bankruptcy, if he afterwards voluntarily promises his debtor to pay the unpaid part of the original debt, that moral obligation is a good and sufficient consideration to pay such debt. *Ib.*
3. **Secret Preference: Validity.** A debtor's note given after a composition settlement as a substitute for a previous note representing a secret preference is void. *Ib.*
4. **Estoppel.** A creditor who induced other creditors to accept a composition settlement without signing it cannot claim that such settlement was void for lack of signatures in his suit to recover on a note representing a secret preference given him by the debtor. *Ib.*
5. **Validity.** The failure of certain creditors who accepted composition payments to sign the composition agreement does not render such agreement void, but only voidable. *Ib.*
6. **Secret Preference: Recovery.** A debtor paying money to a bank for distribution among his creditors under a composition agreement cannot recover back an alleged preferential payment to a creditor, since he lost all interest in the property beyond a right to have the bank account for its proper distribution. *Ib.*

COMPROMISE AND SETTLEMENT.

Agency: Binding Force on Insured. Where an automobile owner was insured against loss arising from claims for damages on account of bodily injuries growing out of accidents occurring while his policy was in force, and he had a collision with the driver of another automobile, which was clearly caused by the latter's negligence, but nevertheless the latter threatened to sue insured, and the insurer's adjuster settled with the party at fault for \$200, the settlement, which insured had no hand in, he being forbidden by his contract to interfere with negotiations for the settlement of claims, did not bind him and estop him from asserting claim for damages to his automobile against the party at fault. *Burnham v. Williams et al.*, 18.

CONTRACTS. See **Accord and Satisfaction; Mortgages and Deeds of Trust.**

1. **Warranty, Express or Implied: Leases of Personal Property.** A lease of machinery which provides that property was leased "in the present condition thereof" discloses an intention on the part of the parties that there should be no warranty express or implied. *Smith Const. Co. v. Mullins et al.*, 501.
2. **Pleading: Fraud.** An action for rent and failure to return machinery in good condition, cannot be defended on the ground that the owner knowingly and fraudulently concealed the fact that the machinery was old, worn and out of repair when rented, where fraud was not set up in the answer. Such a claim must be pleaded. *Ib.*
3. **Evidence: Conclusions of Witnesses.** Questions propounded to witnesses and the answers thereto in language constituting conclusions or ultimate facts to be found by a jury are erroneous. Questions should call for a statement of facts on which the jury could draw its own conclusion. *Ib.*
4. **Mutuality: Acceptance.** A contract is not lacking in mutuality which provides for the sale of a definite quantity of mixed feed, though it does not in explicit words recite that the buyer agrees to purchase and pay for the same, such being implied by the acceptance of the contract by the buyer by signing his name thereto. *Heffernan v. Neumond et al.*, 667.
5. **Acts of the Parties.** Furthermore, the subsequent acts of the parties and part performance of the contract would suffice to render it mutually binding and enforceable. *Ib.*
6. **Evidence: Customs and Usages: Modification.** Evidence offered by the seller, his mill having been destroyed by fire, with a view of showing the existence of a custom "in the trade" to excuse the manufacturer in such cases, was properly excluded, the contract being absolute upon its face, and containing no provision against such a contingency. *Ib.*
7. **Sales: Nonperformance: Excuse.** The mill having been destroyed by fire, the contract being absolute upon its face, and containing no provision against such a contingency, the seller is not excused thereby from a performance of the contract; it not being a case where the subject-matter of the contract went out of existence, through no fault of the contracting party, rendering the contract incapable of performance. *Ib.*
8. **Actions: Defenses: Illegality.** While it is a good defense to a contract valid on its face that it was intended by the contracting parties to violate the law in performance thereof, a buyer of feed for resale cannot be denied relief on account of the seller's nonperformance, unless it was his intention in disposing of the feed to violate the law. *Ib.*
9. **Violation of Law: Question for Jury.** In an action for damages for breach of contract for the sale of feed, the question whether the buyer who acquired the feed for resale did so with the intention of violating the pure food laws as to branding, *held* a question for the jury. *Ib.*
10. **Food: Pure Food Laws: Intention.** Though intention is immaterial in determining whether there was a violation of pure food

CONTRACTS—Continued.

statute, the intent of a buyer of feed who expected to resell, is material in determining whether the contract of purchase was tainted with illegality. *Heffernan v. Neumond et al.*, 667.

CONTRIBUTORY NEGLIGENCE. See **Master and Servant; Railroads.**

CORPORATIONS. See **Chattel Mortgages.**

COURTS. See **Probate Courts.**

Jurisdiction: Title to Real Estate. A suit to reform a deed of trust after it has been foreclosed, wherein the reformation sought does not change or affect the validity of the foreclosure proceedings but only establishes some right as between the original parties to the deeds, does not involve the title to real estate, and the court of appeals, therefore, has jurisdiction. *Nevins v. Coleman et al.*, 252.

CORPORATIONS. See **Chattel Mortgages; Equity.**

1. **Liability on Subscriptions to Stock.** The basis of recovery in creditor's action to enforce stockholders' liability for unpaid balance of subscription is on the implied contract of the stockholders in a corporation to pay for their stock or the contract of subscription. *Rogers v. Yoder*, 27.
2. **Officers: Misapplication of Corporate Funds.** One accepting corporate checks, drawn by an officer thereof, in payment of his private obligations, takes the risk of being required to restore the proceeds thereof, in the event that corporate funds were thereby misapplied. *McCullam v. Buckingham Hotel Co.*, 107.
3. **Misapplication of Corporate Funds: Evidence: Burden of Proof.** A defendant admitting that he received corporate checks drawn by an officer in payment of private obligations has the burden of showing such officer's authority to draw upon corporate funds for private purposes. *Ib.*
4. **Statute: Retroactive Operation.** Laws 1917, p. 143, rendering not liable persons receiving in good faith corporate checks for private obligations of officers, is inapplicable where judgment was entered against defendant payee in 1916. *Ib.*
5. **Officers: Increase in Compensation.** A president of a corporation cannot arbitrarily increase his salary and credit himself with such increase for the preceding year without consent of the directors or stockholders. *Ib.*
6. **Officers: Misapplication of Corporate Funds.** The amount of monthly corporate checks drawn by an officer for his private debts may be recovered, where such officer had previously overdrawn his salary account, although such checks were for smaller amounts than the officer's monthly salary. *Ib.*
7. **Officers: Misapplication of Corporate Funds.** Corporate checks drawn by an officer for his private obligations carry upon their face notice of their irregular and illegal character. *Ib.*
8. **Insurance: Insurance Companies: Powers While Organizing: Promoters.** An insurance company which, though incorporated, was still in progress of organization, and had not obtained a license to do an insurance business, had no power to assume an indebtedness contracted by its promoters, and persons advancing money to the promoter for preliminary expenses had no claim against the corporation, though the money was used for its preliminary expenses. *Reynolds, Receiver, v. Union Station Bank of St. Louis*, 323.

CORPORATIONS—Continued.

9. **Misappropriation of Funds by Officer: Duty to Restore.** One accepting a check from a corporation drawn by an officer thereof in payment of his private obligation takes the risk of being required to restore the proceeds in an action for money had and received in the event that the corporate funds are thereby misapplied. *Ib.*
10. **Actions: Instructions.** In an action by the receiver of an insurance company whose secretary and promoter while it was in process of organization delivered its check in repayment of money advanced to him for preliminary expenses, an instruction to the effect that if the jury found that he acted with the consent and authority of the board of directors they should find for defendant was prejudicial error, where the only reference in the testimony to the board of directors was testimony that the board authorized the secretary to act as fiscal agent to sell the stock. *Ib.*
11. **Instructions: Burden of Proof.** An instruction that the burden of proof was on plaintiff was erroneous in that it is the established rule that such check carried on its face notice of its irregular and illegal character, and the burden was on defendant to show by evidence that the secretary was either the beneficial owner of the fund or duly authorized to make such payment by those having authority to authorize it. *Ib.*
12. **Expiration of Charter: Officers as Trustees.** Whenever the charter of a corporation expired by reason of the time mentioned in its article of incorporation having expired, the affairs of the company must be wound up as provided in section 2995, Revised Statutes 1909. *Scott v. Davis et al.*, 512.
13. **Equity.** But where those in control of the company do not thus wind up its affairs, but proceed to organize a new company with the assets and business of the old one without notifying any of the parties interested of any of the facts, equity, under the facts disclosed in this case, will place the latter in the same position in the new company that they held in the old company whose charter had expired. *Ib.*

COVENANTS. See **Landlord and Tenants.**DAMAGES. See **Common Carriers; Dramshop; Judgments; Landlord and Tenant; Municipal Corporations; Railroads.**

1. **Sufficiency of Evidence.** In an action for injuries to an automobile in collision with another, evidence held sufficient, in the absence of objection to plaintiff's testimony, and in the absence of any proof or attempted proof on defendant's part to the contrary, to sustain a verdict for \$100 for plaintiff. *Burnham v. Williams et al.*, 18.
2. **Personal Injuries: Excessive Damages.** A judgment for \$3500, considering the injury to plaintiff, he being permanently deprived of the use of his thumb and first finger, is not excessive, and the fact that he was intending to take up professional or skilled work rather than purely mechanical work did not make it excessive. *Henderson v. Heman Const. Co.*, 423.

DEEDS OF TRUST. See **Mortgages and Deeds of Trust.**DIVORCE. See **Judgments; Jurisdiction.**

1. **Appellate Practice: Desertion: Sufficiency of Evidence.** The appellate court, in passing upon an equity case determines the case

DIVORCE—Continued.

from the whole record, and while great deference is paid to the finding of the trial judge when sitting as a chancellor in a divorce case, his finding is not conclusive, and when the evidence shows that the plaintiff left the home, and that a separation agreement was made between the parties, the finding of the trial judge that defendant deserted plaintiff is erroneous. *Tegethoff v. Tegethoff*, 167.

2. **Grounds: Indignities.** The alleged indignities *held* not sufficient to afford a statutory ground for divorce. *Ib.*
3. **Evidence: Sufficiency.** In a divorce action, the chancellor's finding that plaintiff husband was unaware of his wife's pregnancy at the date of marriage within Rev. St. 1909, section 2370, enumerating grounds for divorce, *held* not sustained by the husband's testimony in face of evidence indicating that he was responsible for defendant's pregnancy. *Ib.*
4. **Alimony: Separation and Settlement: Fraud: Tender.** Where husband and wife enter into a contract of settlement and separation, in which all money and property rights and obligations are adjusted in consideration of the husband paying her a certain sum of money, she cannot then bring an action for divorce and alimony and seek to repudiate the contract without tendering back the sum received by her under the contract. Such state of case does not come within the exception that a tender need not be made when the party demanding it already owes the other party more than the sum which is claimed should have been tendered. *Gilsey v. Gilsey*, 505.
5. **Action: Equity: Statutory.** An action for divorce where there has been a valid marriage is not an action in equity. Such actions were formerly within the jurisdiction of ecclesiastical courts; but having no such courts, jurisdiction in our courts is dependent upon the statute and the action may be said to be statutory. *Ib.*

DOWER. See *Estates by the Entirety*.

DRAMSHOPS.

1. **Damages: Pleading: Sales of Liquor to Husband after Notice not to Do so by Wife.** In an action against a dramshop keeper and his bondsmen for damages for selling liquor to plaintiff's husband after she had notified the dramshop not to do so, where the petition alleges that the saloonkeeper had executed according to law the dramshop license bond and described a valid instrument and the defendants had failed to deny its execution under oath, the license bond stands confessed as described. *County of Jackson v. Enright et al.*, 527.
2. **Pleading: Separate Sales of Liquor in One Count.** Where a petition alleges ten separate sales of liquor to plaintiff's husband, an habitual drunkard, in one count and a general recovery was had on four of such sales, the court having given the jury a formal verdict which permitted the jury to return a general verdict on the four sales, the defendants, having failed to attack the defect in the petition by motion or other pleading, are not in a position to raise such question after verdict. *Ib.*

DRUGS AND DRUGGIST.

1. **Negligence: Hog Cholera Serum: Liability.** Where defendant, a manufacturing chemist, sold to a veterinary hog cholera virus and

DRUGS AND DRUGGISTS—Continued.

serum for use on hogs, and he used it on plaintiff's hogs, which were thereby killed, the defendant was not an insurer of the remedy even if administered according to directions, especially where is specifically warned of the dangerous character of the substance. *Brown et al. v. Mulford Co.*, 586.

2. **Evidence.** Evidence *held* to show that the manufacturer of hog cholera serum and virus was not negligent in failing to divulge to the purchaser the dangerous and poisonous character of the remedy. *Ib.*
3. The mere fact that hogs died from the use of hog cholera virus and serum in the way it was intended to be used does not establish negligence in its manufacture. *Ib.*
4. **Liability for Articles Manufactured and Sold.** A manufacturer or dealer is liable for injury to third person using articles manufactured or sold by them only when sold as being safe and harmless and negligence is shown in the preparation or directions for using same. *Ib.*

EQUITY. See Warranty Deeds.

1. **Administration of Estates: Jurisdiction of Circuit Courts.** A widow, the sole devisee and legatee, upon the death of her husband, took possession of his property, without the aid of administration, and for five years mingled the same with her own property and for six years more her executor continued such intermingling. During that time the widow and her administrator changed the property so commingled into various other forms of notes and certificates of deposit than those left at the death of the husband, so that it became almost impossible to separate it. In another proceeding an adopted daughter, not mentioned in the will, was adjudicated a pretermitted heir. The plaintiff was duly appointed administrator of the husband's estate and brought this action for an accounting. It was *held* that the facts and circumstances were so complicated and the questions involved so difficult, intricate and abstruse that only a court of equity had the power necessary to adjust and settle them. *Meyer, Admr v. Nischwitz, Exec.*, 101.
2. **Necessity for Administration: Probate Courts.** Where there are two or more heirs to an estate, one of whom appropriates the entire estate to his own use, the others may, upon application to the probate court, have an administrator appointed who will have power to take charge of the property of the estate and distribute it among the heirs, notwithstanding there may be no debts, and the order of the probate court appointing such administrator cannot be collaterally attacked. *Ib.*
3. **Res Adjudicata: Plea of.** A plea of *res adjudicata* will not avail where the parties to the action are not the same, as in a case where one action is brought against a party as an individual and another as the executor of an estate. *Ib.*
4. **Statute of Limitations.** The Statute of Limitations does not begin to run against an action for conversion of a deceased's personal property until the appointment of an administrator of his estate and until such time as the latter may maintain an action for its conversion. In this case the administrator of the estate of the deceased could not have maintained this suit until after the date upon which the adopted daughter was adjudged a pretermitted heir, and in view of this fact, the Statute of Limitations began to run from the latter date. *Ib.*

EQUITY—Continued.

5. **Mortgages and Deeds of Trust: Duplicate Notes: Note First Negotiated the Valid Lien.** An Ice Company, owner of a tract of land placed the title in a straw man so that he might mortgage it for the Ice Company without complicating the matter with the Ice Company's other business. The matter of mortgaging the land was entrusted to one C who was in the investment business but who was also Secretary and Treasurer of the Ice Company. Without the knowledge of the Company C procured the execution of duplicate notes, and negotiated one to plaintiff and some two years or more later and after interest thereon had become past due according to its terms, negotiated the duplicate to defendant N. *Held*, that the note first negotiated was the valid note, and that the purchaser of the other obtained no lien. *Yeomans v. Nachman*, 195.
6. **Right of Innocent Purchaser of Fraudulent Duplicate to Compel its Payment on the Ground of Landowner's Negligence.** Defendant N. bought the note of C. who sold it to her in behalf of his investment company and not as agent of the Ice Company. The latter knew nothing of the fraud and if it was negligent in trusting the matter to C. defendant N. was equally or more negligent. Besides, the fraud perpetrated on N. was committed long after the agency for the Ice Company had been completed; hence, N. is not entitled to compel the Ice Company to make good her loss, nor is the said company estopped to deny liability. *Ib.*
7. **Bills and Notes: Innocent Purchaser: Past Due Interest Coupons.** A purchaser of a note having attached thereto interest coupons that are unpaid and past due, and which provides that if interest is not paid when due then the whole note may become due, and which does not conform to description in deed of trust by which it purports to be secured, is chargeable with notice of its infirmities, *Ib.*
8. **Corporations: Suit for Receiver Pendente Lite by Stockholders: Majority Sale.** Courts of equity will not interfere in the internal management of corporations to settle mere quarrels and differences of opinion between stockholders, as the principle that the majority must rule is rigidly upheld in the absence of fraud, oppression etc. But where the action of the majority is so wholly opposed to the interest of the corporation and the minority stockholders, that it amounts to a fraudulent or wanton destruction of the latter's rights, and the minority is otherwise remediless, equity will grant relief. *Bates et al. v. Werries et al.*, 209.
9. **Grounds for Appointment: Ancient Equity Jurisdiction: Statute.** Under the principles of ancient equity jurisdiction and under the statute, section 3364, R. S. 1909, a court of equity has power to appoint a receiver *pendente lite* to carry on the business of the corporation during the pendency of a suit to determine who are the majority stockholders and to suspend and remove misbehaving directors who by fraud, conspiracy, covenantous conduct or other extreme mismanagement, have jeopardized the rights of stockholders and have unfairly destroyed the original corporate *entente cordiale*. And this is true even where the corporation is solvent. *Ib.*
10. **In an action to remove misbehaving directors and to determine the ownership of certain stock so as to settle who are the majority stockholders and entitled to control the corporation, plaintiffs do not state themselves out of court by alleging that they are in reality the majority stockholders but their rights were not recognized and they could not obtain recognition of them. Nor does**

EQUITY—Continued.

the fact that the offending directors have ceased their wrong doing remove the necessity for a receiver, since the dispute as to who are the majority stockholders still remains and the power still exists to again commence the acts complained of, the moment the chancellor's restraining hand is removed. *Ib.*

11. **Decree: Matters not Within the Pleadings.** In an equity suit by stockholders to determine who shall control the corporation and to remove offending directors, in which petitioners asked for the restoration of specific funds alleged to have been misapplied but did not pray for a general accounting, the decree cannot include other misappropriations not mentioned in the bill for relief. *Ib.*
12. **Issue of Stock: Consideration.** Where the incorporators deposited stock in the corporate treasury with an agreement that it was to be returned to them upon their performance of an agreement to pay a stipulated cash sum for other stock they had deposited, the return of the former stock to them after performance of the said agreement cannot be said to be without consideration. *Ib.*
13. **Reformation of Deed of Trust: Judgment: Res Adjudicata: Parties Bound.** In a suit between grantor and grantee to reform a deed of trust on the ground of mistake, so that a suit for damages might be maintained under a second count for wrongfully assigning said deed, to an innocent holder without notice, the judgment in the foreclosure proceedings brought by such assignee without notice against the grantor was not *res adjudicata* of the question whether there was or was not a mistake in said deed, since the foreclosure judgment did not necessarily decide the question of mistake but only as to whether it should be deemed to exist as to such assignee. *Nevins v. Coleman et al.*, 252.
14. **Issues Determinable in Former Action.** In the foreclosure suit both the grantor and grantee agreed that the mistake existed and the only basis on which the grantee assisted grantor in the defense was that the assignee took the deed with notice. As between the grantor and grantee, no relief that either might have asked against the other would have been responsive to the bill for foreclosure. They were not adversaries and there was no room for an adjudication of the fact of mistake as between them. Hence one of the conditions necessary to the defense of *res adjudicata* was wanting. *Ib.*
15. When a former judgment is relied upon as *res adjudicata* of a fact in a subsequent suit, there must be no uncertainty as to whether the former judgment was based upon the establishment of that precise question of fact, else it will not be *res adjudicata* of such fact. *Ib.*
16. **Effect of Foreclosure Prior to Reformation.** The fact that a deed of trust has been foreclosed will not affect the grantor's right to correct the same as between him and the grantee so as to determine the rights still existing between them. In such case, the reformation would not affect or clash in any way with its terms and legal effect before judgment of reformation, nor affect the rights of parties purchasing under the foreclosure before the reformation. *Ib.*
17. **Clean Hands: Benefit Certificate Fraudulently Procured: Recovery of Dues Paid.** In an action as for money had and received to recover premiums paid for mutual benefit insurance, held that plaintiff, because of his false and fraudulent statement in procuring the issuance of the certificate, had no standing in court; the action being of an equitable nature. *Hellman v. Knights and Ladies of Security*, 308.

EQUITY—Continued.

18. **Case in: Tender.** In an equity case where the party offers to perform any and all orders, directions and judgments of the court, a tender need not be made, though in an action at law it was be unnecessary. *Gilsey v. Gilsey*, 506.
19. **Pleading: General Relief.** Where sufficient facts are stated in a petition in equity to entitle plaintiff to relief, the particular relief asked may be disregarded and any relief consistent with the case made by the petition and with the issues may be granted. *Scott v. Davis et al.*, 512.

ELECTION OF REMEDY.

1. **Application of Doctrine: Inconsistent Remedies.** The doctrine of election of remedies under which the pursuit of one remedy precludes the pursuit of another applies only to those cases in which a party has two remedies which are inconsistent with each other, and has no application to a state of facts where a party has a right to bring more than one suit. *Reynolds, Receiver, v. Union Station Bank*, 323.
2. **Actions.** Defendant loaned money to persons who advanced it to the promoter to an insurance company for preliminary expenses. After the incorporation of the company, but before it received its license to do business, and while it was still in process of organization, the promoter, then secretary of the corporation, drew the check of the corporation, and delivered it to defendant in payment of its loan. *Held*, that the corporation had two causes of action, one against the secretary for conversion, and the other against defendant for money had and received, and these remedies were not inconsistent, and by suing the secretary for his failure to accounts for all moneys belonging to it received by him, it was not precluded from suing defendant. *Ib.*

ESTATES BY THE ENTIRETY.

1. **Note: Share and Share Alike.** A note payable to husband and wife "share and share alike" does not create an estate by the entirety, and upon the wife's death the husband is not entitled to the note as survivor. *Messenbaugh, Admr. v. Goll, Admr.*, 698.
2. **Separate Estate: Husband and Wife: Note: Payee: Express Assent.** Where a note given for purchase money of the wife's separate real estate is made payable to her and her husband "share and share alike," the husband does not have any interest in it, since, to have such interest, the wife by provision of the statute, must give her express assent in writing, and allowing the husband to be made a payee in the note is not such express assent. *Ib.*

ESTOPPEL. See *Bankruptcy; Chattel Mortgages; Compositions With Creditors.*

EVIDENCE. See *Accord and Satisfaction; Appeal and Error; Appellate Practice; Bailments; Bills and Notes; Contracts; Damages; Divorce; Libel and Slander; Master and Servant; Partnership; Railroads; Trial Practice.*

1. **Judicial Notice: Cities.** Relative to a city being authorized to pass an impounding ordinance, the court will take judicial notice of its population under the census, that it is the county seat, and of the statutes on the subject. *Ferry v Sawyer*, 30.
2. **Admissibility: Hearsay Evidence.** In proceeding to declare legacies forfeited under the will for alleged contest thereof by heirs, testi-

EVIDENCE—Continued.

mony of a third person as to statements of a legatee who actually brought the contest, but who was not a party to the instant proceeding, was inadmissible as hearsay. *Puller, Executor, v. Ramsey et al.*, 261.

3. **Admissions: Conspiracy.** To render statements of one alleged co-conspirator admissible as against the other, some competent evidence must be adduced tending to establish the conspiracy. *Ib.*
4. **Admissibility.** In proceeding to forfeit legacies by reason of the heirs having contested the will, admissions of one heir, though an adverse party to the executor, while competent as against her, as admissions against interest, were not binding on the other heirs in the absence of evidence of a conspiracy. *Ib.*
5. **Conspiracy: To Contest Will.** Where testatrix provided in will that if legatees contested the will, the legacies should be forfeited, and one legatee contested, evidence held insufficient to show conspiracy between such legatee and the others to bring a contest and avoid forfeiture of the legacies. *Ib.*
6. **Burden of Proof.** Where testatrix provided by will that if any legatee directly or indirectly contested the will, his legacy should be forfeited, and one legatee contested, and the executor sought a judgment declaring a forfeiture of the shares of certain other legatees on the ground that they had participated in the contest, the burden was on the executor to prove that such legatees directly or indirectly contested the validity of the will. *Ib.*
7. **Admissibility: Intent.** Plaintiff, in an action for breach of contract, may, where it is material as to whether he intended to resell the feed purchased in violation of law, testify as to his intent. *Hefernan v. Neumond, et al.*, 667.
8. **Other Transactions.** In an action against the seller's assignees for breach of contract for the sale of feed, where defendants asserted that the contract was unenforceable because the buyer intended to resell the feed in violation of the pure food statutes, evidence of contracts and letters passing between the buyer and the seller, who fulfilled previous contracts, for the purpose of establishing that the buyer in the past had trouble with the agricultural departments, was properly excluded because unconnected with the matter in controversy. *Ib.*
9. **Collateral Issues.** Such evidence was also properly excluded, because it would have raised various separate collateral issues relating to the buyer's conduct in previous years. *Ib.*

EXECUTIONS.

Sales: Effect. A sheriff's deed to land sold on execution contains no warranty that the judgment debtor has any title to the land, and does not divest, or purport to divest, the title of any one save the judgment debtor. *Pritchard v. Peoples Bank*, 597.

FRATERNAL BENEFICIARY ASSOCIATIONS.

1. **Insurance: Forfeiture of Membership by Nonpayment of Assessment.** Where the by-laws of a fraternal order provided that failure to make payment of a monthly assessment, due on the first of each month, before the 20th, should cause forfeiture of the certificate of membership, and membership thereby cease, *ipso facto*, and that membership could be regained only as provided, and a member

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued.

of the order failed to pay such assessment, and neglected to apply for reinstatement as required, all he could recover from the order were the amounts paid in by him pending consideration of his reinstatement, for, though the law does not favor forfeitures, when the parties make a specific contract for the doing or not doing of a certain thing, and fail, the courts are bound to enforce the contract as made, unless the party insisting upon forfeiture has waived it or is estopped. *Pavlich v. Knights of Pythias*, 184.

2. **Forfeiture for Nonpayment of Premiums: Waiver.** Defendant fraternal order did not, finally and beyond possibility of later insisting upon prompt payment under penalty of forfeiture, waive the portion of its by-laws requiring payment of premium before the 20th of each month by accepting premiums after a much later date from time to time during the life of the policy sued on, up to its final insistence upon forfeiture, where, after the association had notice that the member appeared to be in default, it not only gave him opportunity to apply for reinstatement, and assured him he would be reinstated, but urged him to apply, and although accepting payment of assessments after due, it had a right, the member alive, on due notice to him, to refuse to grant like indulgencies in the future. *Ib.*
3. **By-Laws Construed Together.** By-laws of a fraternal benefit order are to be read and construed together. *Ib.*
4. **Waiver of Requirement of Payment of Premium: Question for Court.** Where the facts as to whether defendant fraternal order had waived its requirement of the payment of premiums before the 20th of each month were undisputed, it was for the court to say whether plaintiff member had made a case warranting him in recovering his entire payments, the order having declared a forfeiture and dropped him from membership. *Ib.*
5. **Insurance: Fraternal Insurance: Defense of Suicide: Burden of Proof.** In an action on a fraternal benefit certificate, which provided the contract should be void if insured died by his own hand, the burden was on the society to sustain such affirmative defense set up by it. *Vormehr v. Knights of the Maccabees*, 276.
6. **Presumption Against Suicide.** Insured's parents, his beneficiaries, were entitled to the benefit of the presumption which the law indulges against suicide; a very strong presumption, not easily overthrown. *Ib.*
7. **Death by Suicide: Question for Jury.** Where the evidence tends to show the presence of cyanide of potassium in the stomach of deceased, and that death resulted therefrom, and no showing by defendant of suicidal intent, while plaintiffs' evidence tends to show the absence of such intent, *held* a question for the jury. *Ib.*
8. **Admission of Beneficiaries as to Suicide: Conclusiveness.** In an action against a fraternal society on its benefit certificate for a death, plaintiffs, beneficiaries, were not concluded by an admission of insured's suicide contained in the proofs of death; such admission being *prima facie* only, subject to explanation and to be overcome by evidence tending to impair its effect, while the undisputed testimony showed that the question in the proofs of death was not asked the beneficiaries by the notary who filled in the answer from his own knowledge of the coroner's verdict. *Ib.*
9. **Action on Certificate: Instruction: Burden of Proof.** In such action an instruction that, in determining whether insured died by his

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued.

- own hand, the jury should not speculate or guess as to whether or not he did die by his own hand, but that, unless defendant had proved by a preponderance of the evidence that accused did so die, verdict should be for plaintiffs, was not erroneous, as leading the jury into the realm of speculation and conjecture. *Ib.*
10. **Insurance: Fraternal Insurance: Recovery of Dues Paid.** Where a benefit certificate was secured by a fraudulent misrepresentation on the part of the insured as to his occupation, he cannot, after the fraud has been discovered, and the policy avoided, maintain an action for return of the premiums paid by him. *Holleman v. Knights of Security*, 308.
 11. **Fraud: Misrepresentation of Occupation.** Stipulations and evidence, in an action to recover premiums paid on a mutual benefit insurance certificate, examined and *held* that insured fraudulently made a false statement as to his occupation, with full knowledge of the occupations prohibited by the order, and that he knew of his ineligibility to membership. *Ib.*
 12. **Insurance: Fraternal Insurance: Action: Tender: Necessary.** Where the beneficiary in a certificate issued by a fraternal benefit association would in all events be entitled to retain the amount paid, the association contending that it was liable only for reduced amount because the member committed suicide, the beneficiary in an action to recover the face value of the certificate need not tender a return of the amount received. *Zinke v. Knights of the Maccabees*, 399.
 13. **Evidence: Admissions.** Where a notary engaged by a fraternal benefit association inserted in the proofs of death that the cause of death was suicide, and the beneficiary in the certificate accepted a check for the amount to which she was entitled in case the member had his death by suicide, the beneficiary was neither estopped from denying that the member came to his death by suicide nor conclusively bound by the admissions in the proof of death, but was entitled to explain or deny them and show they were made as a result of erroneous information or without information. *Ib.*
 14. **Suicide: Question for Jury.** In an action on a certificate issued by a fraternal benefit association, the question whether the member met his death by suicide, *held*, under the evidence, a question for the jury. *Ib.*

GARNISHMENTS.

1. **Wages: Petition: Writ: Statements.** Before a garnishment for wages can be run against a railway company there must have been personal service on the defendant, unless the suit be brought in the county where the defendant resides, or the county where the debt accrued; and the petition and writ must affirmatively show where defendant resides and the cause of action accrued. If the petition and summons does not show these things, the judgment against the garnishee will be reversed. *Kilroy v. Briggs*, 240.
2. **Statutes Construed.** Section 2427, R. S. 1909, as amended by the Laws of 1911, p. 142, forbids the issuance of a garnishment for wages until after a judgment is rendered against the defendant, except under certain conditions therein named, to be stated in the petition. But these conditions do not meet the requirement of certain statements in the petition and summons under section 1 of the Laws of 1911, p. 142, wherein garnishment is forbidden where there is no personal service on the defendant, except under certain other conditions to be stated in the petition and writ. *Ib.*

GIFTS.

Requisites: Consideration. No consideration is necessary to support a gift *inter vivos*. Trustees of La Grange, etc., College v. Parker Adm., 372.

HABEAS CORPUS.

1. **Certiorari: Juvenile Court: Custody of Child.** A female child, seven years old, at the instance of her father, was adjudged to be the ward of the Juvenile court, a branch of a circuit court of Missouri, and taken into the care and custody of the court. The court placed her in charge of her mother who was to report to the court at stated periods. Afterwards the father obtained a divorce in a district court in Kansas and was awarded the custody of the child. He then came to Missouri and instituted a *habeas corpus* proceeding against the mother (his former wife) in another circuit court, which latter court discharged the child from the mother and the Juvenile court and awarded her to the father. On application of the mother, the Court of Appeals directed a writ of *certiorari* to the latter court requiring it to send to such Court of Appeals the record of the proceedings in the matter of the *habeas corpus*, and finding that such record contained the foregoing facts, held that the latter court had exceeded its jurisdiction in its judgment discharging the child from the custody of the Juvenile court and mother and quashed such judgment. *State ex rel. v. Buckner*, 230.
2. **Return: Reply: Verification.** The facts stated in a return to a writ of *habeas corpus* will be taken as true unless denied in an answer or reply pleading properly sworn to; and a reply or answer not so verified is not sufficient. *Ib.*
3. **Excess of Jurisdiction: Custody: Certiorari.** Where a court exceeds its jurisdiction by a proceeding in *habeas corpus* by interfering with the judgment of another court of equal jurisdiction which had in its custody and care an infant child a writ of *certiorari* from a superior court is a proper remedy. *Ib.*
4. **Successive Writs: Res Adjudicata.** Where a person restrained of his liberty is refused a discharge by a court on a writ of *habeas corpus*, he may apply successively to any court of superior jurisdiction in the order of their superiority. But if the person is discharged, the judgment therein is *res adjudicata* as to any other writ, except new matter has arisen changing the *status*. *Ib.*

HUSBAND AND WIFE. See *Estates by the Entirety*.

Heir: Administrator: Title: Action. By provisions of the statutes of Missouri (Sec. 350, R. S. 1903) where a wife dies childless, the husband is her heir to one-half of her personal estate. But upon her death the legal title to such personal estate passes to the administrator of her estate to be administered and distributed under the direction of the probate court, and the husband cannot maintain an action against him for possession of any of such property while in the course of administration. *Messenbaugh, Admr., v. Goll, Admr.*, 698.

INSTRUCTIONS. See *Appeal and Error; Corporations; Libel and Slander; Master and Servant; Negligence; Railroads; Trial Practice*.

1. **Damages: Measure of Damages.** In an action for damages for breach of a contract to sell feed which was manufactured according to a special formula and could not be obtained on the open market, it appeared that defendant, when unable to supply plaintiff with the

INSTRUCTION—Continued.

feed, consented that he should purchase feed manufactured with a substitute for one of the ingredients which could not be secured, the price being the same as if the original ingredient had been obtained. *Held* that, while ordinarily the measure of a buyer's damages is the difference between the contract price and the market value of the goods, and if the goods have no market value the difference between the contract price and the reasonable value of the goods, plaintiff was entitled to recover as damages the difference between the price of the feed contracted for and the actual cost of the best available substitute, provided it was impossible to procure feed exactly like that contracted for at a lower price than that at which the substitute could be obtained. *Heffernan v. Neumond et al.*, 667.

2. **Review: Harmless Error.** In such case, as defendant consented to plaintiff's accepting the substitute, an instruction, allowing plaintiff to recover the difference between the actual cost of the best available substitute and the contract price, was harmless to defendant. *Ib.*

INSURANCE, LIFE.

1. **Assessment Companies: Suicide: Foreign and Domestic.** Domestic and foreign assessment life insurance companies are subject alike to section 6945, R. S. 1909, providing that suicides shall not be a defense to an action on a policy written by such companies. *Anderson v. The Mo., etc., Ass'n.*, 97.
2. **Suicide: Assessment Companies.** A domestic assessment life insurance company issued a policy upon the life of one George Anderson in favor of plaintiff for \$100. The policy provided that if the insured committed suicide the beneficiary should receive only fifty dollars. Anderson committed suicide by shooting himself. The company refused to pay the full amount, claiming that section 6945, R. S. 1909 (the suicide statute) did not apply to domestic assessment companies. It was *held* that a proper interpretation of section 6959, R. S. 1909, makes both foreign and domestic assessment insurance companies subject alike to section 6945 which provides that suicide shall be no defense and that therefore the plaintiff was entitled to recover the sum of \$100. *Ib.*
3. **Policy: Green Slip Attached: General Agent: Illustration.** A general agent of a life insurance company represented to one whom he was soliciting to take out a life policy for \$1000 paid up in twenty years that at the end of that period he had certain privileges in cash, or he could choose a paid-up policy for \$1830 and that a paper to that effect, known as a "green slip" would be attached to the policy. The assured was thereby induced to apply for a policy, and when such policy was delivered to him it had the "green slip" attached whereby it was stated that the assured had the privileges the agent had represented; the slip was *held* to be a part of the policy, notwithstanding the statement therein that it was merely an illustration of what the assured privilege might be. *Thomas v. Equitable Life, etc., Society*, 533.
4. **Surplus: Trust Fund: Account.** The surplus accruing under a life insurance policy paid-up in a given number of years, is a trust fund accruing and growing in the hands of the company for the benefit of the assured, and the company must account for it as trustee, and it cannot, arbitrarily, fix upon a certain sum as the amount due the assured. *Ib.*

INSURANCE, LIFE—Continued.

5. **Attached to Policy: Illustration: Prima-Facie Case.** Where a life insurance company attached a green slip of paper to a policy wherein it stated, by way of illustration of what the policy would earn as surplus in a twenty-year period, what similar policies had earned in other similar periods, such paper made a prima-facie case for the assured that his policy would earn a like amount in the absence of the company showing the actual fact which was within its knowledge and unknown to the assured. *Thomas v. Equitable Life, etc., Society*, 533.
6. **Assessment Plan: Suicide.** The Statute (section 2945, R. S. 1909) providing that suicide shall be no defense to an action on a life insurance policy is applicable to insurance companies on the assessment plan. *Gates v. Knights Templars, etc., Associations*, 688.
7. **Suicide: Contracts.** An insurance company doing business on the assessment plan, cannot by contract, under the statutes of Missouri, make suicide a partial defense or reduce the amount of recovery in the event that the insured commits suicide. *Ib.*

INSURANCE. See *Corporations; Fraternal Beneficiary Associations.*

INTERSTATE COMMERCE. See *Negligence.*

1. **Sending and Receiving Points in One State.** Notwithstanding both the sending and receiving points for a telegram are in one State, yet if its route of transmission is partly through another State, it is interstate commerce. *Davis et al. v. Western Union Tel. Co.*, 692.
2. **State Police Power: Regulation of Telegraph Company.** Prior to June 18, 1910, when Congress asserted its authority over telegraph companies by placing them under the provisions of the interstate commerce statute, the States, in the exercise of their police power, could enforce penalties against such companies for negligent service. But since the enactment of that federal statute, the States have no such power, Congress having taken possession of the entire ground of regulation. *Ib.*

JUDGMENTS. See *Appellate Practice.*

1. **Splitting Causes of Action.** Where creditor of a corporation had recovered judgment enforcing a stockholder's liability on subscription for certain stock, she was not barred, by the rule against splitting causes of action from bringing a similar action against the same stockholder on another block of stock purchased from another; each subscription contract being separate. *Rogers v. Yoder*, 27.
3. **Several Counts: New Trial.** A judgment, in a case involving several counts, may be reversed and carry with it a count found on appeal to be properly decided and that the verdict on such count will stand without retrial of that count, and when the entire case is finally determined, a judgment on that count may be entered. *Brown v. Quincy, etc. R. R. Co.*, 71.
4. **Revival: Divorce: Alimony and Maintenance: Modification: Security.** Rev. St. 1909, section 2375, provides that where a divorce shall be adjudged, the court shall make such order touching alimony and maintenance of the wife and the children as shall be reasonable, and when the wife is plaintiff may order defendant to give security for such alimony and maintenance, and that on neglect to give such security the court may award execution, and that on the application of either party the court may make such alteration

JUDGMENTS—Continued.

from time to time as to alimony and maintenance as may be proper. *Held*, that where a judgment granting alimony and an allowance for the maintenance of a minor child made no provision for security, and the wife, after issuing an execution which was returned unsatisfied, and instituting a proceeding by garnishment, which ended without anything being collected, took no further action for over ten years, and did not have the judgment revived from time to time, the judgment was dead, and the court could not thereafter require such security. *Hauck v. Hauck*, 381.

5. **Limitation.** A judgment for permanent alimony in a divorce case is subject to the same incidents as judgments in other actions at law, and when not revived, no execution can be issued upon it after the expiration of ten years from its rendition. *Ib.*
6. **Inadequate Damages: Verdict: Must Conform to Evidence.** In an action for the value of machinery destroyed, when the only testimony as to its value was, that it was worth \$2000, a verdict for \$500 cannot be sustained, as there is an absence of any evidence to support it. *St. Paul, etc., Mfg. Co. v. Gaus, etc., Mfg. Co.*, 416.

JURISDICTION. See Courts; Equity; Habeas Corpus.

1. **Foreign State: Divorce: Custody of Child.** A district court in Kansas in which a divorce action is pending in awarding the custody of a child cannot deprive a Juvenile court in Missouri of its possession and custody of such child, the latter court having obtained jurisdiction before the action of the court in Kansas, and no effect will be allowed by the courts of Missouri to the action of the court in Kansas. *State ex rel. v. Buckner*, 230.
2. **Reversal With Directions: Jurisdiction.** When a judgment is reversed and cause is remanded with specific directions, the trial court has no other jurisdiction than to follow the directions given. *Gilsey v. Gilsey*, 505.
3. **Courts: Probate: Demands Against Estates.** The Constitution and statutes give probate courts jurisdiction over the allowance of any demand against the estate of a deceased person, and this is broad enough to include demands of every nature whether legal or equitable. *Hess v. Sandner, Ex'x*, 636.
4. Although a probate court has jurisdiction to allow demands of every nature whether legal or equitable, this does not mean that the probate court can be turned into a court of equity to establish the existence of a trust which is denied and the existence of which can be established, if at all, by a court of equity. The cases in which it is said that the probate court has jurisdiction of demands of every nature whether legal or equitable are where the estate had received the property of another, or of the claimant under circumstances which either in law or equity established the relation of debtor and creditor between them. But in a case where the claimant must first obtain equitable relief before he can claim to be a creditor or to have even an equitable right to any property of the estate, the adjudication of such prior equitable right is purely the function of a court of equity, and to permit a probate court to do this is not merely allowing it to make use of and apply equitable principles in the settlement of the *debts* of an estate, but it is authorizing it to exercise the jurisdiction of a court of equity, which cannot be done. *Ib.*

JURY. See Accord and Satisfaction.

JURY—Continued.

Directed Verdict: Burden of Proof: Instructions. Where one interpleads in an attachment suit, he assumes the position of plaintiff and the burden of proof rests upon him and where the testimony offered in support of the interplea is oral the credibility of the witnesses is for the jury and the court is without power to direct a verdict. *Cochrane et al. v. First State Bank*, 619.

JUSTICE OF THE PEACE. See **Splitting Causes of Action.**

LANDLORD AND TENANT.

1. **Damages from Overflowing Drains: Evidence.** In an action by a tenant against his landlord and another tenant for damages to a stock of goods, caused by water from an overflowing sink on an upper floor, evidence *held* to warrant a directed verdict for the landlord on the question of negligent construction of pipes and drains. *The Ornstein, etc., Co. v. Hirschfield Skirt Co.*, 140.
2. **Question for Jury.** In an action by a tenant for damages to a stock of goods caused by water from an overflowing sink of an upper tenant, evidence *held* sufficient to take to the jury the question of whether a drain was stopped and a cock left open through the negligence of the upper tenant. *Ib.*
3. **Covenants: Forfeiture.** Under the general law a breach by the lessee of covenants or stipulations in a lease providing for payment of rent, or for use of the demised premises in a particular manner, does not, where the lease contains no forfeiture clause for a violation of the agreement, warrant the lessor in retaking possession on account of the lessee's breach, but merely gives the lessor a right of action for damages, such being the distinction between covenants and conditions. *Edwards v. Collins*, 569.
4. **Conditions: Breach: Landlord's Right to Recover.** Revised Statutes 1909, section 7880, provides that no tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another, without the written consent of the landlord, neither shall he violate any of the conditions of his written lease, nor commit waste upon the demised premises. The last clause was added to the section by amendment. Laws 1885, p. 187, section 7881, declares that if any tenant shall violate the provisions of the preceding section, the landlord, after giving ten days' notice to quit possession, shall have the right to re-enter the premises and take possession, or to oust the tenant, sub-tenant or under-tenant by proper procedure. A farm lease for five years required the land to be cultivated in the best manner possible. The lessee assigned the lease, and the lessor sought to recover possession on the ground that the assignee did not comply with the covenant relating to cultivation. *Held*, that while these statutes change the general law in certain respects there could be no recovery by the lessor as the covenant contained no provision for forfeiture of the lease for a breach, as the statute did not apply to the lease, it not being a tenancy at will, or, by sufferance, and the term being for more than two years. *Ib.*
5. **Breach of Covenant: Remedy of Landlord.** While Revised Statutes, section 7904, provides special and exclusive procedure for enforcing the collection of delinquent rent, a lessor seeking to recover possession of demised premises on account of the lessee's breach of covenant as to cultivation may, under section 7881, authorizing the lessor to oust his tenant by proper procedure, maintain ejectment. *Ib.*

LANDLORD AND TENANT—Continued.

6. **Leases: Assignment: Consent of Landlord.** Under Revised Statutes 1909, section 7880, declaring that no tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest or any part thereof, without the written consent of the landlord, a tenant whose term was for five years may assign the same without the landlord's consent. *Ib.*

LIBEL AND SLANDER.

1. **Instructions: Power of Trial Court: Law and Fact.** In an action for libel the jury are the judges of both the law and fact, but it is the function of the trial judge to give instructions as in other cases, except that in libel cases the instructions are merely advisory, and if the pleadings and evidence fail to disclose a cause of action the court has the power to direct the jury to return a verdict for the defendant. *Rail v. The National Newspaper Ass'n., 463.*
2. **Innuendo.** The office of the *innuendo* in libel and slander cases is to set a meaning upon words or language of doubtful or ambiguous import which alone would not be actionable. *Ib.*
3. **Definition of Libel.** Libel is defined by statute (Section 4818, R. S. 1909) to be the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse. *Ib.*
4. **Defamatory Words.** Words are libelous *per se* which within themselves necessarily carry a defamatory meaning and are not libelous *per se* if they are susceptible of a reasonable interpretation which excludes a defamatory imputation. *Ib.*
5. **Falsity Thereof: Evidence.** The falsity of all defamatory words is presumed in the plaintiff's favor and he need give no evidence to show them false. The burden is on defendant to rebut this presumption by evidence in support of the plea of justification. *Ib.*
6. **Express Malice: Evidence.** When slanderous words are spoken, or a libelous article is published falsely the law will affix malice to them, there being necessity to offer proof of express malice. *Ib.*

LIFE INSURANCE. See *Insurance, Life; Fraternal Beneficiary Associations.*

MASTER AND SERVANT. See *Negligence.*

1. **Injuries to Servant: Knowledge of Master of Dangerous Condition: Question for Jury.** In an action for injuries to a transfer company's teamster while unloading a wagon, whether defendant transfer company knew, or by the exercise of ordinary care should have known, that nails were protruding from the bed of the wagon, and that the wagon would be used for the delivery of freight, *held* a question for the jury. *Peetz v. St. Louis Transfer Co., 155.*
2. **Dangerous Condition: Sufficiency of Evidence.** In such action, evidence *held* to justify the jury in inferring that the nails in the position found had been driven in the bed of the wagon to secure cleats, and left there when the cleats had been removed, and to warrant the jury in inferring that the wagon with the nails in the bottom of its bed had been in defendant's possession and under its control long enough, that is, a reasonable time, to charge defendant with knowledge of the presence of the nails. *Ib.*

MASTER AND SERVANT—Continued.

3. **Contributory Negligence of Servant.** Where a transfer company's driver took charge of its wagon first about dark, and then early the next morning, when it was heavily laden, he was not chargeable with contributory negligence in failing to see nails in its bed, on one of which he tripped. *Peetz v. St. Louis Transfer Co.*, 153.
4. **Safe Place to Work: Liability.** An employer, is under a plain duty to use ordinary care in providing its employee, with a reasonably safe place in which to work, under penalty of liability for injuries to the employee through its default. *Ib.*
5. **Case for Jury.** In an action for injuries to a transfer company's teamster when he tripped over a nail in his wagon and had his leg crushed by a barrel of molasses, *held* a case for the jury under the evidence. *Ib.*
6. **Injuries to Servant: Evidence.** The fact that cleats had been nailed onto wagons of defendant, and the fact that nails were found in the bed of plaintiff's wagon in such a position as to warrant the inference they had been left there when the cleats were removed, made admissible evidence of the nailing of cleats on some wagons of defendant, without connecting it in any way with wagon plaintiff used. *Ib.*
7. **Injuries to Servant: Contributory Negligence: Evidence.** In an action for personal injuries by a laundry employee whose hand was hurt in an ironing machine, and there was a conflict in plaintiff's evidence as to whether the machine could have been operated in two ways, one of which would have been safe, and the other unsafe, *held* that plaintiff was not guilty of contributory negligence as a matter of law, and that the trial court properly submitted the question to the jury. *McKinney v. Martin, etc. Co.*, 386.
8. **Defective Appliances: Instructions: Sufficiency.** In an action by a laundry employee for injuries received while operating an ironing machine, the court at her request instructed that, though plaintiff knew, or by the exercise of ordinary care could have known, that the machine was out of order and dangerous at the time she was injured, such knowledge did not defeat her right of recovery if she was negligently furnished and ordered by the defendant's foreman to operate such machine, unless the danger was so glaring as to threaten immediate injury, and that an ordinary prudent person in plaintiff's position would have refused to work at the machine. *Held*, that the instruction did not purport to cover the whole case, and direct a verdict, and while the instruction was subject to criticism, its defects were cured by plaintiff's previous instruction, which correctly and fully covered the entire case, and predicated a finding on all the essential facts necessary for the jury to find before they could return a verdict in favor of plaintiff. *Ib.*
9. **Injuries to Servant: Dangerous Machinery: Evidence: Question for Jury.** Evidence in an action for damages for personal injuries to plaintiff while working at a saw for defendant, examined, and *held* sufficient to take the case to the jury. *Henderson v. Heman Const. Co.*, 423.
10. **Witnesses: Cross-Examination: Evidence: Competency.** In a personal injury case, plaintiff's witness, a deputy state factory inspector, testified that there were well-known safety appliances on the market with which the saw that caused plaintiff's injuries could have been guarded. The witness, on cross-examination, to show that he did not consider the saw, which was temporarily located, a manufacturing "establishment" requiring

MASTER AND SERVANT—Continued.

inspection, was asked why he had not inspected it. *Held*, that objection to the question was properly sustained. *Ib*.

11. **Instructions: Best Appliances "Possible."** An instruction telling the jury that if they found that a saw was so placed that it was dangerous to plaintiff while engaged in his ordinary duty as employed sawyer thereabout, or that at the time and prior to plaintiff's injury, if any, "it was possible for defendant to have safely and securely guarded said saw, but that defendant had failed and neglected to thus guard said saw," sufficiently meets the requirements of the statute, and to tell the jury that it must be so guarded as to interfere with its operation was not necessary; the word "possible," as used, putting this issue before the jury. *Ib*.
12. **Injuries to Servant: Statutes: Construction.** Rev. St. of Mo. 1909, Sec. 7828, providing that machinery, etc., in manufacturing, mechanical, and other establishments, when so placed as to be dangerous to persons employed therein or thereabout, shall be safely guarded when possible, applies to a power-driven saw not in a building and temporarily placed and used in cutting lumber, since it is machinery used in a manufacturing and mechanical enterprise, and comes within the meaning of the word "establishment," and whether it be permanently or temporarily placed, is immaterial. *Ib*.
13. **Injuries to Servant: Actions: Evidence.** In an action by a railroad employee injured when, by reason of the tipping of a coal car, an end gate which he and others were unloading toppled over and broke his leg, evidence that it was customary to block such cars which were made so as to tilt when going around curves, when unloading heavy objects therefrom, was admissible as tending to establish the master's negligence. *Bridges v. St. Louis, etc., Ry. Co.*, 576.
14. **Actions: Evidence: Admissibility.** Although a master is not required to furnish an absolutely safe place, nor is he guilty of negligence because a safer method or appliance could have been used, evidence in such case that the blocking or bracing of the car would have made it impossible for it to rock or tilt, and thus absolutely safe, cannot be excluded on that ground. *Ib*.
15. **Injuries to Servant: Negligence.** Recovery cannot be defeated by showing that the master was guilty of other negligence than that relied on, where the negligence relied on was the proximate cause of the injury. *Ib*.
16. **Negligence: Prima-Facie Case.** The plaintiff makes a prima-facie case of negligence when he shows that the defendant omitted to use a reasonably sure means of lessening or preventing a known danger and his case does not fail because some other means might have been but was not used by defendant to accomplish the same result. *Ib*.
17. **Injuries to Servant: Care.** Where plaintiff was transferred from his usual duties, and with others required to unload end gates from a coal car, he cannot, having been injured when an end gate toppled over by reason of the tilting of the car, be denied recovery on the ground that he failed to exercise sufficient precautions in that the bottom of the end gate, which was to be slid over the side of the car, might have been pulled further from the side so as to give it a greater angle; it appearing that the servant was working under the immediate direction of a foreman. *Ib*.
18. **Injuries to Servant: Changing Condition of Place of Work.** Where a servant engaged with others in unloading end gates from a car

MASTER AND SERVANT—Continued.

was injured when the gate fell by reason of the tipping of the car which was not blocked, recovery cannot be denied on the theory that the injury resulted from an accident arising in the progress of the work, and that the duty of blocking the car rested on the servants; it appearing that the car was of a type made to tilt when it went around curves. *Bridges v. St. Louis, etc., Ry. Co.*, 576.

19. **Actions: Evidence.** In an action for injuries received by plaintiff when an end gate which he and other servants were unloading from a coal car fell, the questions whether the master could have anticipated the injury which resulted from its failure to block the car which was of a type that tilted, and whether it was guilty of negligence by reason of such failure, held for the jury. *Ib.*
20. **Safe Place to Work: Changing Conditions Caused by Progress of Work.** Where a contractor's carpenter, on a building where brickwork was done by another contractor, was injured by giving way of wall erected by such other, the rule relieving the master from liability for unsafe place to work, where a building is in course of erection and conditions are constantly shifting, did not apply, where the brickwork in the wall had been laid on Friday, and the accident happened the following Monday, and where the only change in conditions was that caused by the progress of the carpenter's work. *Bidwell v. Grubb*, 655.
21. **Changing Conditions Caused by Directions of Foreman.** Nor does this rule apply where the change in conditions is that caused by directions of the foreman changing the servant's manner of work, in consequence of which the servant is doing his work in the manner directed, which resulted in accident to him. *Ib.*
22. **Condition Created by Another Contractor.** Where carpenter on a building was injured by giving way of a brick wall erected by another contractor, his employer was liable, if by reasonable care he could have discovered the dangerous condition of the wall. *Ib.*
23. **Evidence of Possibility of Discovering Defects.** In action against his employer by carpenter, injured by giving way of brick wall erected by another contractor on building on which he was working, evidence held sufficient to show that ordinary careful inspection by his employer would have revealed defective condition of the wall. *Ib.*

MECHANIC'S LIENS. See Chattel Mortgages.

1. **Leases: Liability: Improvements by Lessee.** A lessor, by binding his lessee to make improvements of substantial benefit upon the demised premises, thereby constitutes the lessee his agent, within the meaning of the Mechanics' Lien Law (Rev. St. 1909, sections 8212-8237) and may thereby subject his property to a lien for labor performed and materials furnished in making such improvements under a contract with the lessee, the obligation arising from contract and not from the relation of landlord and tenant. *Weis, etc., Marble Co. v. Gardiner*, 35.
2. **Statutes: Construction.** The Mechanic's Lien Law is highly remedial, and should be liberally construed in favor of the lien. *Ib.*
3. **Leases: Liability: Improvements by Lessee.** Under a lease which provided that all alterations in the way of marble paneling and decorating should be made by the lessee, and that all alterations, additions and improvements should become the property of the lessor, the premises leased were subject to a mechanics' lien for

MECHANIC'S LIENS—Continued.

materials and labor furnished to the lessee in making the specified improvements. *Ib.*

4. **Proceedings Constituting Commencement of Action: Filing Petition: Process.** Where a petition in a suit to enforce a mechanics' lien was filed at the October term and within 90 days after the filing of plaintiff's lien, the suit was begun within 90 days as to defendants served by publication, although the order of publication was not made or published until the December term following, at which term the summons was returnable, in view of Rev. St. of Mo. 1909, section 1766, providing that the filing of a petition shall be taken and deemed the commencement of the action. *Hydraulic etc. Brick Co. v. Lane et al.*, 438.
5. **Trial Practice: Prosecution of Action: Unreasonable Delay.** Where plaintiff's petition in a mechanic's lien suit was filed at the October term, returnable to the December term, when order of publication was made, which was returnable to February term, replies filed at the same term, and case heard at June term, it cannot be said that there was an unreasonable delay on plaintiff's part in proceeding with the case; there being no application made by any party or order of court under section 8235a, Laws 1911, p. 316, speeding up the action. *Ib.*
6. **Publication by Defendant: Necessity.** Where, in a suit to enforce a mechanic's lien, plaintiff's service by publication was timely, it was unnecessary for a defendant, filing an answer and seeking to enforce its own lien, to sue out an order for publication, since that sued out by plaintiff was sufficient for the whole case. *Ib.*

MORTGAGES AND DEEDS OF TRUST. See Equity.

1. **Priorities: Mechanics' Liens.** A valid mortgage given by the owner of property constitutes a lien superior to liens arising under contract made by the mortgagor subsequent to such mortgage, and this applies to a subsequent mechanic's lien, though the value of the security was increased by the labor or material of the mechanic's lien claimant. *United Iron Works Co. v. Sleepy Hollow M. & D. Co. et al.*, 562.
2. **Note not Executed: Recital of Debt: Validity.** Where, to secure an extension of time for a debt due, a deed of trust was executed, reciting that it was given to secure a debt purporting to be evidenced by a note, the deed of trust is valid, though the note was never executed, and the amount specified was considerably in excess of the debt for which the extension was sought, and a deed of trust reciting that a debt exists, is valid, independent of the note it purports to secure, as the amount of the debt may be established by parol. *Mandle v. Horspool*, 649.
3. **Contracts: Consideration: Extension of Time: Debt of Third Person.** A promise to grant a debtor an extension of time though indefinite, if a reasonable time be given, is a promise on a consideration, and will support an agreement by third persons to secure the debt by executing a deed of trust. *Ib.*

MUNICIPAL CORPORATIONS.

1. **Marshal: Action for Damages: Instructions.** In an action against a village marshal for punitive damages for confining plaintiff in an unsanitary calaboose without food, water, or fuel, instructions as to punitive damages were faulty where they failed to require that before plaintiff could recover there must be a finding

MUNICIPAL CORPORATIONS—Continued.

- that he was damaged by his treatment. *Village of Nixa v. McMullin et al.*, 1.
2. **Evidence.** Such instructions were also erroneous because the evidence failed to justify them. *Ib.*
 3. **Care of Prisoner: Statutes.** Under R. S. 1909, secs. 9439, 9464, defining the powers and duties of a village marshal, sec. 9492, requiring a bond to faithfully perform duties, and sec. 9436, giving board of trustees of village power to maintain a calaboose, a marshal making a lawful arrest must use care to see that his prisoner is not oppressed or treated inhumanely, and if the calaboose is known to him to be an unfit place of confinement, his failure to use care and accord ordinarily decent treatment will be a breach of his bond. *Ib.*
 4. **Treatment of Prisoner: Action for Damages: Evidence.** In an action against a village marshal for punitive damages for breach of duty under bond to use due care and accord ordinarily decent treatment, evidence *held* to sustain a judgment for defendant. *Ib.*
 5. **Automobile Collision: Pleading.** In an action for injuries to an automobile in collision with another car, the petition charged that while plaintiff was driving his car north along a street in the city, and when about thirty feet north of another street, defendant carelessly and negligently and without warning turned the car he was driving across the street immediately in front of plaintiff's car and collided with it, and further that defendant failed or neglected to go to the intersection of the street or any other street to turn his automobile, as required by the ordinances of the city. *Held*, that, under the rule that after verdict the petition must be construed favorably to uphold the verdict and judgment, the petition was sufficient, though the city ordinances, violation of which was pleaded, were not in evidence, since the petition contained a charge of common law negligence. *Burnham v. Williams et al.*, 18.
 6. **Nuisances: Street Obstruction.** One cannot recover from a city for injuries sustained from a street obstruction even though a nuisance, its allowance being a wrong common to the public, and gave plaintiff no right of private action. *Trower v. City of Louisiana*, 352.
 7. **Injuries.** One injured by a stray bullet from a street carnival shooting gallery operated by permission and with knowledge of city officers cannot recover from the city. *Ib.*
 8. **Police Powers: Liability for Street Obstruction.** Municipal corporations are liable for injuries caused by street obstructions; but such liability is fixed upon the city, not by reason of its violation or disregard of its police powers, or the doing of acts in connection with its police power, but by reason of its failure and neglect to properly discharge its corporate duties apart from the duty it owed as a municipality. *Ib.*
 9. **Liability for Injuries Arising from Malfeasance or Nonfeasance of Corporate Officers.** One injured by a stray bullet from a street carnival shooting gallery cannot recover damages therefor from the city; since, in the exercise of the city's public functions, it was not liable for the nonfeasance or malfeasance of its officers in permitting such an exhibition as a street carnival, and not abating the shooting gallery as being a dangerous part of the exhibition. *Ib.*

NEGLIGENCE. See **Drugs and Druggists; Master and Servant; Railroads.**

1. **Liability.** In Missouri, where an injury is caused by negligence, for which any one would be liable, the liability is placed against the party whose negligence is found to be the proximate cause of the injury. *Burnham v. Williams et al.*, 18.
2. **Stock Killed on Track: Pleading: Common Law and Statutory Negligence.** Where there are two causes of action embraced in one count for the killing of a cow on a railroad track, one for negligently failing to maintain a proper and reasonably safe cattle guard as required by the statute and one at Common Law charging that the cow strayed upon the railroad track where it was not fenced and the railway employees negligently and carelessly ran over said cow and the evidence is sufficient to support the verdict of the jury, the judgment thereon will not be disturbed. *Brown v. The Quincy, etc. R. R. Co.*, 71.
3. **Master and Servant: Actions: Evidence.** In an action against the proprietor of a theater for the wrongful death of one who fell through an open trapdoor, evidence held to warrant a finding that the trapdoor had been opened and left open by the proprietor's servant, acting in the scope of his authority. *McCullen v. Fishell, etc., Co.*, 130.
4. **"Invitee," "Licensee," Who are: Distinguished.** Where deceased, an expressman, came to defendant's theater to do some hauling, in which defendant was mutually interested with deceased's employer, and went upon the stage in the course of that business, and, in the darkness fell through an open trapdoor which defendant's servant had left open, deceased was an "invitee," being upon the stage for the mutual benefit of his employer and defendant, and hence defendant was bound to exercise ordinary care for his protection; deceased as an "invitee" distinguished from a "licensee" not being upon the stage for his own pleasure or benefit. *Ib.*
5. **Instructions: Measure of Damages.** An instruction in the usual form on the measure of damages for personal injuries, held not bad for failure to exclude any injuries caused by plaintiff's negligence. *Henderson v. Heman Const. Co.*, 423.
6. **Assumption of Facts: Ordinary Care.** An instruction given at the instance of plaintiff in an action for personal injuries correctly defining ordinary care, and then charging that the omission of such care is negligence, etc., is not subject to the criticism that it is a mere abstract statement of law, leaving the jury to draw their own conclusions as to what degree of care defendant was bound to exercise, or that it assumes the defendant was negligent. *Ib.*
7. **Personal Injuries: Railroads.** Plaintiff, an employee of a grain elevator company, was assisting in putting grain cars on a scale, which was being done by means of a power plant in the elevator which operated a cable. There were three cars to be moved, one empty, the other two loaded. The cable was fastened to the cars by attaching the end to a U-bolt on the first car. The U-bolt pulled out and the cable hook struck plaintiff injuring him. He sued the railroad company. It was held that the demurrer to the evidence should have been sustained. *Caenfelt v. Missouri, etc., R. R. Co.*, 486.

NEGLIGENCE—Continued.

8. **Unwarranted Use of Appliance.** Where it is shown that a U-bolt on a box car is placed thereon only to be used to pull that car alone and that when the plaintiff, an employee, not of the railroad company, but of an elevator company, was injured, they (elevator employees) were undertaking to move three cars, the U-bolt thereby subjected to a use for which it was not intended, plaintiff cannot recover damages from the railroad company, the latter being under no obligation to furnish U-bolts. *Caenfelt v. Missouri, etc., R. R. Co.*, 486.
9. **Federal Employers' Liability Act: Exclusive Remedy.** When the facts and circumstances surrounding an injury to an employee of a railroad engaged in Interstate Commerce bring the case within the provisions of the Federal Employers' Liability Act, such act is supreme and excludes every other remedy. *Spaw v. The Kansas City, etc., R. R. Co. et al.*, 552.
10. **Liability of Lessee Railroad: Interstate Commerce.** If an employee of a lessor railroad is injured while engaged in work, which, at one and the same time, was not only a part of the general interstate commerce of such lessor but also of the particular Interstate Commerce being carried on by the lessee, then such injured person would, at the very time of his injury, be engaged in the Interstate Commerce of both roads, and would be an "employee" of both roads within the meaning of the Interstate Commerce Act. *Ib.*
11. **Federal Employers' Liability Act: Limitations.** An action for damages for negligence of a railroad commenced more than two years after the injury occurred cannot be maintained when the facts bring the case within the Federal Employers' Liability Act. *Ib.*
12. **Interstate Commerce.** When the work being done at the time of the injury is such that it directly affects or facilitates the carriage of Interstate Commerce, then the injured employee is engaged in such commerce. *Ib.*
13. **Comparative Negligence: Effect of Contributory Negligence.** Under Federal Employers' Liability Act, April 22, 1908, chapter 149, 35 Stat. 65 (U. S. Comp. St. 1916, secs. 8657-8665), contributory negligence is not an absolute defense. *Bridges v. St. Louis, etc., R. R. Co.*, 576.
14. **Burden of Proof: Proximate Cause: Other Causes Equally Probable.** The burden of showing a causal connection between the negligence and the injury is on plaintiff, and where the injury may have resulted from another equally probable cause and the uncertainty so inheres in the evidence as a whole, when received in the light most favorable to plaintiff after resolving all conflicts in his favor, that it is mere speculation to attribute the injury to the cause tainted with negligence, the plaintiff cannot recover. *Brown, et al. v. Mulford Co.*, 586.

NEW TRIAL. See Appellate Practice.

1. **Number of New Trials: Errors of Law: Weight of Evidence.** Section 2023, R. S. 1909, allowing only one new trial to either party except in case of error in a matter of law or misbehavior of the jury, imposes no limit on the number of new trials granted on account of errors committed during the trial. Said section means that a party is entitled to one new trial solely on the ground that the verdict is against the weight of the evidence if the trial court is of the opinion that such is the case; but he is forbidden from getting a second new trial on that ground or from getting a new trial twice on a ground not coming within the exceptions of the statute. *Culp v. Knights of Pythias*, 77.

NEW TRIAL—Continued.

2. **Same.** A new trial was granted defendant for error in admitting evidence offered by plaintiff, for error in excluding evidence offered by defendant and because the court thought the verdict was against the weight of the evidence. After a change of venue a new trial was had and a verdict returned for plaintiff which the court set aside because the jury "disregarded the law" given in defendant's instruction. *Held*, that even if this can only be construed to mean that the verdict is against the weight of the evidence, still, as defendant's right to have the first new trial was complete because of the errors of law committed therein, defendant is not precluded from the benefit of the second new trial because the first court inserted, as an additional reason for granting the first new trial, that the verdict was against the weight of the evidence, since defendant had not exercised its right to have one new trial solely because the verdict was against the weight of the evidence. The first court was not in a position to say, once for all, that the verdict was against the weight of the evidence since the case was not tried that time upon the proper evidence. *Ib.*
3. **Second New Trial: Errors of Law.** Where one new trial was granted for errors of law committed by the trial judge, namely, in admitting evidence offered by plaintiff and in excluding evidence offered by defendant, the fact that the judge also gave as a third reason that the verdict was against the weight of the evidence, the granting of a second new trial on the last-mentioned ground was not forbidden by section 2023, R. S. 1909, since said section imposes no limit on the number of new trials granted on account of errors committed, and a litigant is entitled to one new trial solely on the ground that the verdict is against the weight of the evidence if the trial court is of the opinion that such is the case. *Culp v. Knights of Pythias*, 628.
4. **Statute Construed.** Section 2023, as construed by the courts, means that a party is entitled to one new trial where the verdict is against the weight of the evidence, but he is forbidden from getting a second new trial on that ground, or from getting a new trial twice upon a ground not coming within the exceptions of the statute. *Ib.*

PARTNERSHIP.

1. **Receivers: Property.** A receiver will not be appointed in partnership cases, unless there is some property belonging to the firm on which the court through the receiver will lay hands. *Popham v. Sloan*, 7.
2. **Evidence.** Evidence in suit based on alleged partnership relation of parties *held* not to show, what is necessary for appointment of receiver, ownership by the firm of any property which a receiver could take charge of. *Ib.*

PARTITION. See Voluntary Associations.**PAYMENT.**

1. **Voluntary Payment: Recovery.** Evidence examined regarding payment of an additional sum by a debtor to a creditor after having paid the amount specified in a composition agreement, and *held* to establish that the second payment was voluntary. *Ferguson, etc., Co. v. Beuckman*, 41.
2. **Same.** A debtor cannot recover back a voluntary payment to a preferred creditor made subsequent to a composition agreement and payment thereunder. *Ib.*

PAYMENT—Continued.

3. **Voluntary Payments: Recovery.** One who voluntarily pays money with full knowledge relative to the claim made cannot recover it back in the absence of fraud, or duress, although the money paid was not actually due. *Pritchard v. The People of Holcomb*, 597.
4. **Recovery: Duress.** The voluntary payment of an illegal demand cannot be recovered back, unless paid under the immediate necessity to preserve the owner's property or person, and ordinarily a threat of legal process is not duress; hence plaintiff, who, after rendition of judgment, acquired land from a judgment debtor, cannot, having bid in the land at execution sale, recover the amount paid under his bid on the theory that it was paid under duress, for the sheriff could not sell plaintiff's interest, but only the interest of the judgment debtor, and the sheriff's deed could only amount to a cloud on plaintiff's title and result in future litigation. *Ib.*

PERSONAL INJURIES. See **Damages; Negligence.**

PLEADING. See **Dramshops; Tender.**

1. **Construction: Sufficiency of Petition after Verdict.** After verdict and judgment, a petition is not open to attack, if by reasonable implication or fair intendment it sets up facts sufficient to constitute a cause of action. *McCullem v. Fishell, etc., Co.*, 130.
2. **Petition: Cause of Action: Reply.** The petition is the place where one's cause of action must be found pleaded; and one cannot declare upon one cause of action in a petition and recover upon a distinct cause of action in a reply. *Davis et al. v. Western Union, etc., Co.*, 692.
3. **Telegraph Company: Estoppel Pleaded in Reply.** Where a plaintiff instituted an action against a telegraph company for a penalty under section 3330, R. S. 1909, for failure to promptly transmit and deliver a message, and the company by its answer makes the defense that its wires were down by reason of storms and floods; the plaintiff, in reply, may plead estoppel in that defendant did not inform plaintiff of that fact when he delivered the message to its agent, as required by section 3332 of the statute. *Ib.*

PRACTICE (APPELLATE). See **Appellate Practice.**

PRACTICE (TRIAL). See **Trial Practice.**

PRINCIPAL AND AGENT.

Act of Agent. For the principal to be bound by the act of his agent, the agent must have acted either with the express or implied authority of the principal, and, if the agent was acting entirely outside of the principal's business for some purpose of his own, it is not the act of the principal, unless adopted by him. *Burnham v. Williams, et al.*, 18.

PROBATE COURTS. See **Equity; Jurisdiction.**

PROCESS.

1. **Return: Recital of Place of Service.** Under Revised Statutes 1909, section 1763, requiring return of service of writ to recite the place of service, a return of writ served on Sunday, reciting, to bring the service within section 1785, as to Sunday service, that the person served was a nonresident of the State, and that at the time of service was about leaving the county and State, but not referring to the place of service, was insufficient, since nothing can be presumed

PROCESS—Continued.

- in favor of the return, but it must show on its face that every statutory requisite has been complied with. *Taylor v. Helter*, 643.
2. **Caption.** Under this statute, a return, not referring to place of service, is not aided by presumption or intendment from the caption prefixed thereto, "State of Missouri, County of Pike—ss." *Ib.*
 3. **Aided by Extrinsic Evidence.** The recitals of the return cannot be aided or enlarged by extrinsic evidence. *Ib.*
 4. **Amendment.** Where recitals of a return are insufficient, upon proper application to the trial court may allow amendment of the return. *Ib.*

PROHIBITION.

1. **Demands against Estate: Legal Services: Probate and Circuit Courts: Concurrent Jurisdiction.** A claim of an attorney for legal services rendered an estate at the instance of an executor, is a proper subject of a demand against the estate within the meaning of section 197, Revised Statutes 1909; and the circuit court has concurrent jurisdiction to try an action brought to recover for such services. *State ex rel. v. Garesche*, 457.
2. **Jurisdiction of Circuit Court.** The circuit court has jurisdiction to decide whether or not legal services rendered at the instance of an executor are demands against the estate under section 197, Revised Statutes 1909, in a suit by an attorney against the estate seeking to establish his claim. *Ib.*

RAILROADS. See Negligence.

1. **Injury to Animals: Fences: Circumstantial Evidence.** Though R. S. 1909, sec. 3145, allowing double damages for injuries to animals on railway tracks, where railway company fails to maintain a lawful fence and sufficient cattle guards, is a penal statute and must be strictly construed, circumstantial evidence may be sufficient to sustain a judgment for plaintiff. *Montgomery v. Deering etc. Ry. Co.*, 12.
2. **Sufficiency of Evidence.** Circumstantial evidence, showing defective condition of railway fence, that plaintiff's cow was seen on the railway right of way, and the next morning was found injured with marks of having been violently struck, coupled with the facts that cow's tracks, evidences of collision with an animal, and hair and hide corresponding with that of plaintiff's cow were found, held sufficient to warrant recovery under Sec. 3145, R. S. 1909, allowing double damages where railway company fails to maintain lawful fence and sufficient cattle guards. *Ib.*
3. **Injury to Animal by Train: Damages: Instructions: Immediately.** In instructions to assess as damages the difference between the reasonable market value of said cow "immediately before" being injured on railway track and "the reasonable market value of said cow after" the injury, the word "immediately" was used to fix the condition prior to the injury. *Ib.*
4. **Damages from Back Water and Overflow: Statute of Limitations.** A cause of action for damages for overflow and back-water caused by a railroad embankment which accrued within five and more than three years before the institution of suit is not barred by the three year Statute of Limitations (Sec. 1890, R. S. 1909), as that statute is both penal and remedial and the cause of action, being placed 198 M. A.—47.

RAILROADS—Continued.

safely under the remedial part thereof, is controlled by the five year period of the statute (Sec. 1889, R. S. 1909). *Brown v. Quincy, etc., Ry. Co.*, 71.

5. **Damages from Overflow and Backwater: Assignability of Causes of Action.** Claims for damages due to overflow and back water caused by a railroad embankment are assignable. *Ib.*
6. **Constitutional Questions: Should be First Raised in Trial Court.** Constitutional questions injected into a case for the first time after a rehearing is granted in the appellate court are raised too late. Such questions should be first raised in the trial court. *Ib.*
7. **Instructions: Ambiguity of Instructions.** An instruction, which while not intended, is so worded that it might be taken to mean that if *any* of the overflows were caused by the negligence of the railroad the jury should find for plaintiff on all of them, is erroneous. *Ib.*
8. **Negligence: Crossing Accident: Municipal Corporations: Speed Ordinance.** In an action for personal injuries caused by collision, a city ordinance regulating the speed of freight trains, etc., inside the corporate limits and also requiring a watchman to be stationed on the advancing end of locomotives, etc., *held*, the court properly allowed plaintiff to introduce the ordinance. *De Rousse v. West, et al. Receivers*, 293.
9. **Contributory Negligence: Questions for Jury.** Evidence *held* to present a question for the jury whether plaintiff driving a wagon should have stopped to listen before attempting to cross the track ahead of a freight train which he could not see, and no warning of its approach having been given. *Ib.*
10. **Death at Crossing: Evidence.** Evidence *held* sufficient to support a finding that plaintiff's deceased husband was on a crossing and not on the right of way when struck by a train. *Kerr v. Bush, Receiver*, 607.
11. **Crossings: Signals: Negligence: Burden of Proof: Contributory Negligence.** Failure of trainmen to give signals when approaching a crossing as required by Revised Statutes 1909, section 3140, is negligence *per se* which casts the burden on the railroad to show such failure was not the cause of injury. The ordinary rule that the burden is on plaintiff to show the causal connection is changed by statute in such cases. *Ib.*
12. **Injuries at Crossing: Contributory Negligence: Question for Jury.** Contributory negligence is a defense in such cases and whether one killed on a railroad crossing where no statutory signals were given and the night was dark and rainy was guilty of contributory negligence in not seeing or hearing the train *held*, under the evidence, a question for the jury. *Ib.*
13. **Deaths at Crossings: Signals: Statutes Applied.** The statutory requirement as to railroad trains giving signals on approaching public road crossings, inures only to the benefit of persons traveling on the public road and crossing or intending to cross the railroad track and Revised Statutes 1909, section 3140, requiring certain signals and throwing the burden on railroad to show that failure to give statutory signals was not the cause of injuries at the crossing, does not apply to one killed on the crossing who was walking down the track and not across the track. *Ib.*

RAILROADS—Continued.

14. **Deaths at Crossings: Signals: Statutes Applied.** Revised Statutes 1909, section 3140, requiring certain signals and throwing the burden on railroad to show that failure to give statutory signals was not the cause of injuries at a crossing, does not apply to one killed on the crossing who was walking down the track and not across the track. *Ib.*

RECEIVERS. See **Partnership.**

RECORDING INSTRUMENTS. See **Chattel Mortgages.**

REPLEVIN.

1. **More Than One Defendant: Misjoinder.** In a replevin suit for two horses against two defendants, the latter plead misjoinder based solely on a lack of community of interest or title in the property, and not upon any claim as to who took the property or as to whose possession it was in at the time of the commencement of the suit and the issuance and service of the writ. Both defendants, in their testimony, admitted that at that time both horses were in possession of one of them. Hence, plaintiff was entitled to maintain replevin as to both horses had the suit been brought against that one alone. The other need not have been made a defendant, but as he sought to defeat the action by contesting plaintiff's title to one of the horses and made no claim that he should not have been sued because he was not concerned in the taking or withholding possession, nor that he innocently obtained possession from the other defendant, he is not entitled to be discharged from the case. If he did not join in taking the property he did join in withholding it and made the other's act his act as much as if he had gone with his co-defendant and took the animals. *Central Mo. Trust v. Wulfert et al.*, 85.
2. **Joint Judgment.** A joint judgment in replevin can be rendered only against parties shown to have a community of interest in the property to have both been concerned in the taking or detention. *Ib.*
3. **Demand When Necessary: Wrongful Taking.** Where the taking of the property is wrongful and the plaintiff has not consented thereto, no demand is necessary to enable him to maintain suit. *Ib.*
4. **Sufficiency of Judgment.** Under section 2650, the judgment for plaintiff in replevin, based upon a verdict which assesses the value of the property taken and damages for its detention, should recite those facts and give the plaintiff the right to choose the property or its assessed value. But where the verdict did not assess any damages or value, and plaintiff is not asking for anything but the property, and the judgment goes no farther than to adjudge its return which can be affected since it is still in defendants' possession, the defendants cannot complain since they are not injured. Defendants should not complain because plaintiff did not obtain all it was entitled to. *Ib.*

RES ADJUDICATA. See **Equity; Habeas Corpus.**

SALES. See **Executions.**

1. **Place of Delivery: F. O. B., and Freight Paid Synonymous.** As fixing the place of delivery, the terms freight paid and f. o. b., are synonymous. *Street et al. v. Werthan, etc., Co.*, 336.
2. **Carrier as Agent.** Where a contract of sale of goods was silent as to the railroad over which goods were to be shipped freight prepaid,

SALES—Continued.

that the seller complied with a request of the buyer in sending one carload over a certain road, had no bearing on how or where the delivery of the unshipped portion of the order was to be made, because the buyer had no authority to compel the seller to ship by any particular route. *Street et al. v. Werthan, etc., Co.*, 336.

3. **Market Value: Shipment of Goods.** Where an order of goods was to be shipped "freight paid to Houston, allowing you 3 per cent discount for cash against document," the point of delivery was Houston, and hence the market value at Houston was the basis of damages for failure to ship. *Ib.*
4. **Failure to Deliver: Damages: Sufficiency of Evidence.** Evidence *held* sufficient to support a finding that a purchaser of undelivered goods who bought in the open market on September 4th, where the last day for fulfillment of the contract was August 31st, had complied with the established rule with reference to such purchases, and had bought at the market value. *Ib.*

SCHOOLS AND SCHOOL DISTRICTS.

Consolidated: Maintenance of Elementary Schools: Meaning of Words in Statute. In mandamus to compel the directors of a consolidated school district to maintain an elementary school "within two and one-half miles by the nearest traveled road of the home of every child of school age within said school district," as provided in Act of March 14, 1913, Laws 1913, pp. 721, 725, where the return alleged that "relator does not live upon a highway," that an elementary school was maintained which was within the statutory distance from where the relator's children reached the highway; a demurrer to the return, which confesses the facts properly pleaded therein, was properly overruled. The statute does not mean that a schoolhouse must be maintained within two and one-half miles of any child's home, but only that the schoolhouse must not be more than that distance from the point where access to the public road is had. The fact that children do not live upon a highway but must go some distance to get to it is not a matter of consequence. That is merely their misfortune or inconvenience. *State ex rel. v. Hunter*, 249.

SHERIFFS AND CONSTABLES.

1. **Liability on Official Bonds for Assault: Sufficiency of Petition.** A petition, in an action on the official bond of a constable, which sets out that the deputy in executing a writ of replevin in his hands, had violently assaulted the defendant in the writ, states a good cause of action. *State ex rel. v. Boepple*, 63.
2. **Official Bonds: Action: Evidence: Sufficiency.** In an action on the official bond of a constable for injuries alleged to have been inflicted by his deputy on relator when the deputy was executing a writ of replevin, evidence *held* sufficient to take the case to the jury. *Ib.*

SPLITTING CAUSES OF ACTION.

Justice of the Peace: Commencement of Suit: Different Demands: Maturity. All causes of action growing out of the same transaction but falling due at different dates, which are due at the institution of a suit should be included in such suit. The beginning of a suit before a justice of the peace dates from the delivery of the summons to the constable. A landlord sued his tenant from month to month before a justice of the peace for one month's rent. The summons was void and a new one was issued and judgment rendered. After filing the suit but before the new summons was issued, a

SPLITTING CAUSES OF ACTION—Continued.

second month's rent fell due. Afterwards suit was brought on the second month. Defendant defended on the ground that it should have been included in the first suit and was barred. It was held that it was not barred. *Plonsky v. Morrison*, 247.

STATUTES CITED AND CONSTRUED.**Session Acts.**

Laws of 1858-60, p. 131, see page 376.
 Laws of 1885, p. 197, see page 573.
 Laws of 1885 p. 187, see page 570.
 Laws of 1897, p. 130, see page 98.
 Laws of 1911, p. 141, see page 241.
 Laws of 1911, p. 292, see page 187.
 Laws of 1911, p. 312, see pages 36, 41.
 Laws of 1911, p. 314, see pages 452, 563.
 Laws of 1911, p. 146, see page 227.

Revised Statutes 1889.

Section 5869, see page 98.

Section 5912, see page 98.

Revised Statutes 1899.

Section 746, see page 530.

Section 1102, see page 611.

Revised Statutes 1909.

Section 70-74, see page 703.

Section 3339-40, see page 602.

197, see page 457.

3364, see page 210-222.

350, see page 701.

3365, see page 225.

1112, see page 227.

3366, see page 222.

1756, see pages 439, 454.

4098, see page 232.

1889, see page 75.

4102, see page 234.

1890, see page 74.

4122, see page 232.

1850, see page 91.

4818, see page 478.

2021, see page 144.

6354, see page 245.

2023, see pages 77, 628.

6940, see page 99.

2081-3, see pages 112, 117,
170.

6945, see page 97.

6937, see page 99.

2100, see page 499.

6959, see pages 98, 689.

2292, see page 457.

7042, see page 532.

2298, see page 95.

7196, see page 530.

2343, see page 96.

7223, see page 532.

2370, see page 182.

7410, see page 248.

2375, see page 381.

7880, see page 570.

2381, see page 384.

7881, see page 573.

2401, see page 498.

7924, see page 574.

2404-5, see page 492.

8057, see page 425.

2427, see page 242.

8212, see pages 35, 41.

2535, see pages 492, 500.

8215-16, see page 563.

2619, see page 317.

8219, see page 563.

2650, see page 90.

8223, see page 531.

2774, see page 45.

8228, see page 448.

2793, see page 492.

8235, see page 455.

2861, see page 601.

8237, see page 440.

2995, see page 512.

8247-8, see page 241.

3078, see page 559.

8309, see page 700.

3097-8, see page 574.

9229, see page 33

3100, see page 574.

9374, see pages 31, 33.

3140, see page 611.

9436, see page 3.

3145, see page 14.

9439, see page 3.

3339-40, see page 602.

9464, see page 3.

3330, see page 692.

9492, see page 3.

3332, see page 692.

9974, see page 290

STATUTES, CONSTRUCTION OF. See **Bonds.**

TENDER. See **Equity.**

Pleading: Judgment. Where a tender is requisite to maintaining a cause of action and none is pleaded, judgment may be rendered on the pleading. *Gilsey v. Gilsey*, 505.

TRIAL PRACTICE. See **Appellate Practice; Mechanics Liens.**

1. **Instructions: Refusal.** The refusal of requested instruction covered by those given is not error. *State ex rel. v. Boepple*, 63.
2. **Instructions: Credibility of Witnesses.** Where there was a direct conflict in the testimony, not reasonably attributable to mistake, inadvertence, or lapse of memory, an instruction as to the credibility of witnesses was proper. *Robert v. Rialto Bldg. Co.*, 121.
3. **Demurrer to Evidence: Inferences.** In passing on a demurrer to plaintiff's evidence the evidence is to be viewed in the light most favorable to plaintiff, and every inference fairly and legitimately deducible therefrom should be drawn in his favor. *McCullen v. Fishell, etc., Co.*, 130.
4. **Evidence: Objections in Trial Court.** Where no objection was made in the trial court to the line of examination and testimony as assuming a fact not in evidence, the admission of plaintiff's testimony as to the size of the nails brought to him from the bed of the wagon, and that they were similar to those in the wagon, was not error. *Peetz v. St. Louis Transfer Co.*, 155.
5. **Instructions: Contributory Negligence: Instructions as a Whole.** In action for personal injuries caused at a railroad crossing where plaintiff relied on general negligence and the humanitarian doctrine and violation of a freight train speed ordinance, and defendant set up contributory negligence, an instruction on the violation of the ordinance, though it omitted reference to the defense of contributory negligence, was not prejudicial, where other instructions fully covered contributory negligence. *DeRousse v. West et al. Receivers*, 293.
6. **Humanitarian Doctrine: Conflicting Theories.** An act of negligence which brings the case within the humanitarian rule can be alleged along with other acts of negligence, provided the acts which bring the case under the humanitarian rule and the other acts of negligence alleged, are not inconsistent and self-contradictory. *Ib.*
7. **Contributory Negligence: Necessity of Pleading.** Even though no plea of contributory negligence is set up by the defendant, yet whenever it is shown by plaintiff's own proof that there was contributory negligence such as to preclude a recovery, the trial court should take the case from the jury upon a demurrer to the evidence. *McKinney v. Martin, etc., Co.*, 386.
8. **Instructions: Sufficiency.** Where a series of instructions taken together contained a complete exposition of the law, and covered every phase of the case, a verdict obtained thereon must be sustained, though the instructions taken separately are incomplete. *Ib.*
9. **Appellate Practice: Improper Argument of Counsel: Sustaining Objection.** Where the court sustained an objection to improper argument by plaintiff's counsel, and defendant's counsel did not move to discharge the jury and declare mistrial, or to rebuke plaintiff's counsel, error on appeal cannot be predicated thereon. *Ib.*

TRIAL PRACTICE—Continued.

10. **Instructions: Invited Error.** In an action for value of machinery destroyed a requested instruction to assess damages for plaintiff at such sum, not exceeding \$2000, as the jury found the reasonable value to be, did not invite the error in finding a verdict for \$500, which was absolutely unsupported by any evidence. *St. Paul, etc., Mfg. Co. v. Gaus, etc., Mfg. Co.*, 416.
11. **Instructions: Assumption of Facts: Request.** An instruction that if the jury found that while engaged in the duties of his employment working the saw, cutting pieces of lumber "which plaintiff was required to hold in position with his hands," etc., given under the general direction that if the jury found so and so to be the fact, does not assume that he had a right to hold in position with his hands the lumber he was sawing, and if certain elements were omitted, it was mere non-direction, and defendant cannot complain, inasmuch as no request was made for instructions covering such elements. *Henderson v. Herman Const. Co.*, 423.
12. **Instructions: Refusal.** The refusal of requested instructions covered by those given is not error. *Ib.*
13. **Jury Question: Conflicting Evidence.** Where the evidence as to a question of fact is conflicting, the question is for the jury. *Edwards v. Collins*, 569.

VERDICTS. See Appellate Practice; Judgments; Jury.

VOLUNTARY ASSOCIATIONS.

1. **Stock: Restrictions on Sale: Validity.** Provisions in the constitution of a voluntary association, organized to erect and maintain a telephone system, requiring members to offer stock for sale, first to the association, was a mere condition precedent, attached to the right to sell the stock, and not an unreasonable restraint upon the alienation of the stock, and was therefore valid. *Aubuchon v. Aubuchon et al.*, 316.
2. **Sales of Stock: Validity.** Members of a voluntary association, organized to erect and maintain a telephone system, having agreed to be bound by the constitution, which required members to offer stock for sale, first to the association, could not complain that the association was not empowered to take title to the stock, in the absence of an offer of sale of the stock to the association. *Ib.*
3. **Partition of Personal Property: Rights of Members.** Provisions in the constitution of a voluntary association, organized to erect and maintain a telephone system, requiring members to offer stock for sale, first to the association, was a condition precedent attached to the right to partition personalty, and such provision was valid, so that members of the association were not entitled to partition until after they had offered their stock for sale to the association. *Ib.*

WARRANTY. See Contracts.

WARRANTY DEEDS.

1. **Breach of Covenant: Unincorporated Companies.** A, who had no title, conveyed by a general warranty deed real estate to B, and B by a like deed conveyed the property to C, an unincorporated company; and C by a like deed conveyed the property to D. *Held*, that the deeds from B, to C and C to D were void and persons dealings with C were not estopped to deny its existence as a corporation, as there was no intention on the part of C to obtain from the Secretary

WARRANTY DEED—Continued.

of State a charter. But a suit having been brought by the heirs of B against D to try the title and D in his answer having set up that he had the title by reason of the conveyances from B to C and from C to D, and the court having found for the defendant, and there having been no appeal, A in a suit on his covenant of in defeasible seizin contained in his deed to B is not in a position to say that D and his privies have not such rights in the real estate under the various conveyances that he may not sue A upon the covenant contained in the father's deed. *Talbert et al. v. Grist*, 492.

2. **Grant, Bargain and Sell.** The words "grant, bargain and sell" used in a warranty deed are, under section 2793, Revised Statutes 1909, covenants of warranty and for quiet enjoyment, and against incumbrances, as well as seizin, which run with the land, and they may be sued upon by any subsequent grantee who sustains a loss by failure or defect in the title. *Ib.*
3. **Equity: General Relief.** In an action brought under section 2535, Revised Statutes 1909, the court may hear and finally determine any and all rights, claims, interests, liens and demands whatsoever of the parties, or any one of them, concerning or affecting real property and may award full and complete relief, whether legal or equitable, and the relief provided in sections 2401, 2403, 2404 and 2405, Revised Statutes 1909, may be granted to defendant in the same suit. *Ib.*

WILLS. See *Appellate Practice; Evidence.*

WITNESSES. See *Master and Servant.*

1. **One Party Dead: Actions Ex Delicto: Corporation Employees.** The statute of Missouri (Section 6354, R. S. 1909) refuses one party the privilege of testifying when the other party is dead; and such statute applies in actions *ex delicto* as well as *ex contractu*. And in the instance of one party being a corporation, the agent or employee who made the contract, or transacted the business, or who, while acting within the scope of his employment, committed the wrong, is taken to be the corporation, and if he is dead at the time of the trial, the other party cannot testify. *Brunk v. Metropolitan St. Ry. Co.*, 243.
2. **Assault: Third Parties: Competent Witnesses.** Where an employee of a corporation, acting within the scope of his employment, assaults another and dies, the injured party who brings an action for the wrong cannot testify, and the fact that other persons witnessed and have knowledge of the altercation and are competent witnesses, will not prevent the disqualifying application of the statute. *Ib.*
3. **Two or More Employees: Death of One: Witness.** If two employees of a corporation, acting within the scope of their employment, wrongfully assault another and one of them dies, the statute (section 6354, R. S. 1909) will not disqualify the injured party as a witness in his own behalf, since the other wrongdoer (standing as a corporation) survives and may testify. *Ib.*
4. **Conductor: Motorman: Street Car: Assault: Death.** The conductor of a street car being operated for the company by himself and a motorman assaulted a passenger. The conductor died, and it was held that the statute (section 6354, R. S. 1909) prevented the injured party from being a witness in his own behalf, and that the fact that passengers observed the altercation, and that the motorman saw it, but took no part in it, all being competent witnesses, would not prevent the application of the statute. *Ib.*

WITNESSES—Continued.

5. **Impeaching Own Witnesses.** A party cannot impeach his own witness unless ticked, and though he does not vouch for the truth of the testimony of his witness, he cannot call a witness who, as he knows will testify against him, and then impeach the witness by testimony as to contrary statements made out of court. *Puller exec. v. Ramsey et al.*, 261.

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

KANSAS CITY COURT OF APPEALS.

contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (e. g.): "*Summons issued on the — day of —, 188—, executed on the — day of —, 188—;*" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

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presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

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RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

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RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal and *not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.
(Adopted, January 6, 1913.)

RULE 27. The defacement of books in the library by marking the margin of pages, or by drawing lines underneath printed matter, or by turning down the corners of leaves, is prohibited.

RULE 28. An abstract of the record is a court paper not for the exclusive benefit of either party; therefore, in printing such abstract the parties are forbidden to italicize any part of it, except where the record from which the abstract is taken is in italics. If italics are desired, they may be used in the statement, brief and written argument.

RULE 29. Where an original instruction is modified by the trial court, it is not necessary to print them separately in the abstract. The instruction, as modified, should be printed with the words of modification printed in italics, or between brackets, that the court may readily observe the point of difference.

RULE 30. Where there are several exhibits in the cause, they should be identified in the index to the abstract more definitely than by a mere number, or letter.

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the _____ day of _____ 190—, executed on the _____ day of _____, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstract above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section §13.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section §13, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from an report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk. No motion to certify any case to the Supreme Court will be entertained nor shall any such motion be filed by the clerk. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 177 Mo. App. 477.

Ordered by the court that rule 24 is amended to read as follows:

Rule 24.—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument of the argument of the case, shall otherwise order: *Provided, However*, in any case; and *Provided Further*, that in appeals or writs or error in causes originating elsewhere than in the Courts of Common Pleas or the Circuit Courts the time for argument shall not exceed thirty minutes on each side unless the court for cause shown and before the commencement of the argument shall grant further time

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from the reports or text books.

Promulgated October 4, 1916.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

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states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the words appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove,

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty days before the day on which the cause is set for hearing, and file

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six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over deeds or other documentary evidence, the abstract shall set out the substance of the same. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned. Unless the abstract conforms to this rule, costs will not be allowed for printing the same, and such abstract may be disregarded by the court.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just.

RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume, and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st, 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

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RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a justice of the peace, the time for argument shall not exceed thirty minutes on each side.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

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RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and a signature of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

Adopted March 3, 1913.



